

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF ALABAMA
3 SOUTHERN DIVISION

4 BOBBY SINGLETON, et al., *
5 Plaintiffs, * 2:21-cv-1291-AMM
6 vs. * January 12, 2022
7 JOHN MERRILL, in his official *
8 capacity as Alabama Secretary *
9 of State, et al., *
10 Defendants. *
11 ***** *
12 EVAN MILLIGAN, et al., *
13 Plaintiffs, * 2:21-cv-1530-AMM
14 vs. *
15 JOHN MERRILL, in his official *
16 capacity as Alabama Secretary *
17 of State, et al., *
18 Defendants. *
19 ***** *
20 MARCUS CASTER, et al., *
21 Plaintiffs, * 2:21-cv-1536-AMM
22 vs. *
23 JOHN MERRILL, in his official *
24 capacity as Alabama Secretary *
25 of State, et al., *
Defendants. *
***** *

21 TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
22 VIA ZOOM CONFERENCE
23 VOLUME VII
BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

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PROCEEDINGS

(In open court.)

JUDGE MARCUS: Are the parties ready to proceed?

MR. DAVIS: Defense is ready, and Mr. Byrne the next
is here and ready, Judge.

JUDGE MARCUS: Okay. Caster plaintiffs are ready?

MS. KHANNA: Yes, Your Honor.

JUDGE MARCUS: And the Milligan and Singleton plaintiffs?

MR. BLACKSHER: Singleton are.

MS. WELBORN: Milligan are, as well, thank you.

12 JUDGE MARCUS: We are going to turn now to your next
13 witness, Mr. Davis.

14 MR. DAVIS: Thank you, Judge. The defense calls
08:30:12 15 Mr. Bradley Byrne.

16 || BRADLEY BYRNE,

17 having been first duly sworn, was examined and testified as
18 follows:

19 JUDGE MARCUS: Thanks very much. And if you would be
08:30:30 20 kind enough to state your name for the record.

21 THE WITNESS: My name is Bradley Byrne, B-R-A-D-L-E-Y,
22 B-Y-R-N-E.

23 JUDGE MARCUS: Thank you very much. And with that,
24 Mr. Davis, you may proceed.

08:30:40 25 MR. DAVIS: Thank you, Judge.

1 DIRECT EXAMINATION

2 BY MR. DAVIS:

3 Q Good morning, Mr. Byrne.

4 A Good morning.

08:30:45 5 Q Where do you live, Mr. Byrne?

6 A I live in Fair Hope, Alabama.

7 Q How long have you lived in the Gulf Coast region?

8 A My entire life.

9 Q And what do you do for a living?

08:30:57 10 A I am a lawyer.

11 Q Have you ever served in public office?

12 A I have.

13 Q Would you please tell the Court about your experience in
14 public service beginning with your earliest appointed or
08:31:10 15 elected position?16 A Yes. I was elected to the Alabama State School Board in
17 1994 and took office in December of that year because my
18 predecessor left to go take another position, so I started that
19 a little bit earlier.08:31:25 20 I served the Alabama State School Board eight years. I
21 was elected to the Alabama State Senate in 2002, and under
22 Alabama law, you take office immediately after general
23 election. So I became the state senator in November of 2002.
24 I served there until May of 2007, when I became the chancellor
08:31:43 25 post-secondary education for the state of Alabama.*Christina K. Decker, RMR, CRR*

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1 In December of 2013, I was elected in a special election
2 to the United States House of Representatives representing the
3 First District, which is the southwestern part of Alabama. I
4 served there until January 3rd of last year, when I left
08:32:01 5 office, and my term expired.

6 Q Thank you, Mr. Byrne.

7 I want to share my screen now and show you a map that has
8 been marked as Defendants' Exhibit 55. Can you see this map,
9 Mr. Byrne?

08:32:14 10 A I can.

11 Q I will represent to you that these are the congressional
12 districts that the Alabama Legislature passed November the last
13 districting cycle.

14 Does the First Congressional District look similar to the
08:32:33 15 district as it existed when you represented the First District?

16 A It is similar. It does not include the lower half of
17 Clarke County that I had in my district. And there's a small
18 sliver of the eastern part of Escambia County that is now part
19 of the Second District, but other than that, it's the same
08:32:51 20 district that I had.

21 Q To your recollection, does the Second District look
22 similar in structure to the way it was when you were serving in
23 Congress?

24 A It does.

08:32:58 25 Q Thank you. How would you describe Gulf Coast region,

1 Mr. Byrne? And by that, I mean what is it, if anything, that
2 binds that region together to make it a community of interest?

3 A Well, we are on the water. We are on the Gulf of Mexico.
4 We have lots of bodies of water in the district. Mobile Bay is
08:33:22 5 very prominent, and Perdido Bay is pretty prominent. A number
6 of rivers, sounds, et cetera. So water defines the district
7 very much. It's not just any kind of water. It's salt water,
8 brackish water, et cetera.

9 What that means is we have a major deep water port. We
08:33:40 10 have a major ship building industry. We have major tourism
11 industry that's related to the beaches and the water. And also
12 a major seafood industry. And all of those are unique in terms
13 of Alabama unique to this part of the state.

14 And so when you deal with the things that happen in this
08:33:58 15 part of the state, you are dealing with something that's unique
16 in the state of Alabama.

17 Q Do people throughout the region through the other counties
18 in the First District commute in to Mobile for employment?

19 A Yeah. There are major highways that come from the
08:34:16 20 northern part of the district into both Mobile and Baldwin
21 counties. So people in what I call the collar counties, which
22 are Washington County, Escambia County, Monroe County, and
23 presently that lower part of Clarke County, they'll use those
24 highways to go back and forth.

08:34:29 25 It's not just their jobs. It may be going to the doctor,

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1 the hospital, their shopping, et cetera. So there's this sort
2 of larger community involving these four, five counties that
3 flow into and out of Mobile and Baldwin counties. It used to
4 be just Mobile County. Baldwin County has grown so much.
08:34:49 5 Baldwin County is now a very big part of that, as well.

6 Q What role does the Port of Mobile play, if anything, in
7 binding that region together?

8 A Well, it's huge. Mobile started out in the 18th Century
9 as a port. It was a port for French traders, but it was still
08:35:07 10 a port, and it's been a port for 300-plus years, and the port
11 continues to grow. In fact, it had amazing growth last year.
12 It's not just the port itself. The port is at the very center
13 of what is a major logistics hub. For example, we have one of
14 Walmart's four mega distribution centers here in Mobile County.
08:35:25 15 That's all related to the port.

16 The fact that we have Airbus in Mobile, we have it in part
17 because they can ship directly via the ship channels directly
18 from a port in Europe to a port right outside of their assembly
19 facility here in Mobile. So that port is the anchor for the
08:35:46 20 economy around here. And it literally directly and indirectly
21 creates tens of thousands of jobs. So it's extremely important
22 to this area.

23 Q Are there industries in the area along the rivers that
24 flow into the port?

08:36:01 25 A Oh, yeah. We have major industries, chemical industry

1 players, steel industry players up and down the Mobile river
2 and as you get further north of that into the Tombigbee River.
3 So the river, the Tombigbee River, then on the eastern side,
4 the Alabama River, those are very important to the economy and
08:36:25 5 the culture of this area.

6 Q And do any of those industries rely on the port for
7 distribution of the products?

8 A Well, for the distribution of their products, but also for
9 stuff that comes in that they have to use to create their
08:36:41 10 product. Maybe different types of elements that go into the
11 chemical process. In the case of steel, we actually have steel
12 slabs that come up from Brazil that are then offloaded off the
13 ships and put on barges that come up to a company called AM/NS
14 Calvert. It's a multinational company that employs well over
08:37:01 15 2,000 people in the production of coal and steel.

16 Q Is there anything unique about the history of this region,
17 in terms of international influence?

18 A Yeah. We were founded by the French in 1702. We had
19 20 years in there where we were a British colony and then 30 or
08:37:21 20 40 years where we were a Spanish colony.

21 So unlike the rest of the state of Alabama, we have this
22 extensive Colonial history, and it continues to form our
23 culture today. We're far more likely to have Catholic
24 residents here than in any other part of the state. We have
08:37:42 25 Mardi Gras, which may sound like just sort of a frivolous fun

1 thing, but Mardi Gras is big business here. There are a lot of
2 businesses that that is what they do. So it's not unusual to
3 find Mardi Gras parades not just here in Mobile, but you go
4 north of here into Washington County, you go over into Baldwin
08:37:55 5 County, several of the cities in Baldwin County, and even up
6 into Monroe County, they have Mardi Gras because there is that
7 cultural connection between the two.

8 I was reading an interesting article the other day about
9 Truman Capote. He used to have relatives in Monroe County that
08:38:20 10 he would visit. Mr. Capote wrote that he actually entered into
11 contests as a child to write stories, and those stories were
12 part of a contest in the *Mobile Press Register*. He was in
13 Monroe County. This is 100 years ago.

14 So you can see that there's this long-term connection
08:38:34 15 between what I call the collar counties in the First
16 Congressional District and Mobile itself.

17 Q Are Baldwin County in Mobile County closely connected?
18 A Oh, yeah. If you look at a map of Mobile and Baldwin
19 counties, it looks like an inverted U. And what's in the
08:38:53 20 interior of that U is Mobile Bay. And so if you go back
21 literally centuries, you will see a connection between the two
22 counties.

23 So my family is originally from Baldwin County. The
24 Byrnes were from Baldwin County. But if you go back to the
08:39:08 25 late 18th Century, you will see one of my ancestors was

1 actually baptized in the Roman Catholic Church here in Mobile.
2 So there's this intersection between those two counties that's
3 been going on for a very long time.

4 Q Would you say those counties are more closely connected
08:39:24 5 today than they were, say, in the '60s and 70s?

6 A Oh, yeah. For example, when -- I live in Baldwin County,
7 and I work in Mobile County.

8 If you were in my car with me today, you would have seen
9 thousands of cars crossing from Baldwin County into Mobile
08:39:42 10 County. So you have lots of people who live in Baldwin County,
11 but work in Mobile County.

12 Not as many people, but there are people who live in
13 Mobile County and work in Baldwin County.

14 So there's really strong interconnection between the two
08:39:56 15 counties.

16 Q What are -- you mentioned a few of these. Let's get on
17 the record and say what are some of the major industries and
18 employers in the Mobile region?

19 A For instance, the Port of Mobile. That's a big one. You
08:40:17 20 have AM/NS Calvert, which is the steel company. There's
21 Outokumpu, which is a stainless steel company; there's SSAB,
22 another coal and steel company; and Earth Pipe, which is a
23 steel pipe company, so those are steel companies.

24 Numerous chemical companies. I think about it. Huntsman,
08:40:42 25 there's -- oh, shoot. There's Shell. I can't remember all the

1 chemical companies. It must be 20.

2 Q Of course.

3 A We have the University of south Alabama, which is a major
4 employer in this area. We have Austal USA, which is a
08:41:01 5 ship-building company. We have Airbus USA, which is major
6 airplane assembly facility here. We have the Mitchell Cancer
7 Research Center. We have -- I mentioned the Walmart mega
8 distribution center. We have a number of other logistic
9 distribution centers because of the port.

08:41:21 10 And then if you go into the southern part of Baldwin
11 County, you have major businesses are there to provide
12 condominium access to tourists that come down here, hotels,
13 restaurants, et cetera. In Bon Secour, Alabama and Bayou La
14 Batre, Alabama, these are two of the largest seafood
08:41:43 15 distribution places literally in the United States of America.

16 So Nelson Bon Secour Fishery in Bon Secour, huge
17 distributor for seafood. I can remember eating crab meat in
18 Washington D.C. and finding out during the meal that that crab
19 meat came from Bon Secour, Alabama.

08:42:01 20 So you know, no other part of Alabama has industries like
21 this. I am not saying it's better or worse than the other
22 parts of the state. It's just unique.

23 Q Would you describe the First District as racially diverse?

24 A Oh, yes. Very much so. We have obviously long-time white
08:42:21 25 and black communities, but we have Hispanic communities. Down

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1 in Bayou La Batre, we have a number of southeast Asian
2 communities, people that left those areas in the aftermath of
3 the Vietnam War and settled Bayou La Batre, Alabama and formed
4 these huge fishing communities. We have other Asian
08:42:40 5 communities here. This is always been because of the port I
6 guess a very diverse area, going back to the earliest times
7 here.

8 So it's not unusual to find somebody like me who has
9 French ancestors, you know, Scottish ancestors, Irish
08:42:58 10 ancestors, German ancestors. It's not unusual to find people
11 here that can draw their lines back to various parts of Africa.
12 There are people here that can draw their lines back to the
13 various nations in southeast Asia. This is a very diverse area
14 and always has been.

08:43:15 15 Q Are there military interests in the First District?

16 A Yes, sir.

17 Q What do you have?

18 A We have a shipyard here called Austal USA that makes two
19 different ships presently for the United States Navy, combat
08:43:33 20 ship and the expeditionary fast transport vessel. Those are
21 the only vessels that that shipyard makes. It employs
22 presently about 3,500 people. At one point, it had as many as
23 4,500 people. Ship building has been a major part of Mobile
24 going back to Colonial times.

08:43:50 25 We have all -- you have people here who are like fifth,

1 sixth generation ship builders. Making ships is not like any
2 other manufacturing process because they're so darn big. It's
3 just a lot more to it than making a car, or even making the
4 airplanes that Airbus makes here.

08:44:09 5 So we -- that ship building for the Navy here is a big
6 deal.

7 Q In the years when you were representing this area in
8 Congress, Mr. Byrne, were there any particular issues that you
9 would focus on?

08:44:23 10 A Sure. When you are a Congressman, you're the primary
11 representative for the people in your district in Washington,
12 D.C.

13 So there were a myriad of things that were particular to
14 this district that I had to focus on. The shipyard, for
08:44:43 15 example, very critical that we make sure those ships are
16 authorized and appropriated year after year after year.
17 There's nothing automatic about that. There's a fight over
18 that every year.

19 But it may sound mundane. We had a huge issue here in
08:44:56 20 involving the Gulf Red Snapper, which is the number one fish
21 people like to catch out in the Gulf of Mexico. We have a huge
22 industry in Orange Beach built up around charter boats, people
23 that own their own boats. Think about it. It is not just the
24 fact of the boat, it's you have to buy fuel for the boat, you
08:45:14 25 have to buy ice for the boat, you have to buy bait for the

1 boat, you have to buy beer to go out and have fun in the summer
2 time. It's a huge industry. And we have a real problem with
3 those seasons being artificially shortened, and we had to go
4 work on trying to get those seasons back to a reasonable level.
08:45:32 5 For friends of mine that wanted to go fishing on Saturday, it
6 was for that industry. It was important.

7 We have a program in the federal government called GOMESA.
8 It is an acronym. But basically, it provides a certain
9 percentage of what the federal government gets in off shore gas
08:45:47 10 leases and oil leases that go to the states that border the
11 Gulf of Mexico. That's to help them deal with what could be
12 the very negative effect from that like with the BP oil spill
13 that we had back in 2010. So I was constantly working on that
14 and similar programs.

08:46:03 15 So I actually formed a caucus in Congress called the I-10
16 Caucus because those of us that represented districts in the
17 Gulf Coast had sort of unique problems that we would actually
18 work on together because those same interests weren't shared
19 with our colleagues and our state delegations up in the upper
08:46:21 20 parts of our states. So we would work together on things like
21 that.

22 And then there would be just the stuff that, you know,
23 every industry faces when you deal with federal government
24 regulations. Ship building has all sorts of interesting issues
08:46:36 25 with the Coast Guard, et cetera. So, yeah, I mean, I had to

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1 work on those. And really had to become an expert on those
2 issues along with my staff.

3 Q Obviously, a longer snapper season would benefit the
4 people who enjoy going out in the Gulf and fishing. Does it
08:46:54 5 have any benefit to other residents of the First District
6 having a healthy fishing industry?

7 A Okay. That's an industry around it. There are charter
8 boat fleets, people that work on charter boats. There are
9 people that run marinas. There are people that sell fuel.
08:47:10 10 There are people that sell ice. There are people that sell
11 bait. There are people that, you know, provide condos and
12 hotel rooms that people stay in when they go fishing.

13 I mean, I remember when I was first elected and I had a
14 meeting with the people in Orange Beach that were in that
08:47:24 15 industry, and the room was just crammed full of people. I
16 never really thought of it that clearly before just how many
17 people were touched by the fact that we do or do not have a
18 good snapper season. And it was a major motivation to make
19 sure that we got that problem solved because it touched so many
08:47:41 20 different lives and touched so many different jobs.

21 Q Would issues that you worked on such as is the snapper
22 season or a healthy port or a healthy ship building industry,
23 would they help both the black and the white residents of the
24 First District?

08:47:55 25 A Oh, yeah. I mean, people down here, we have people of all

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1 races that are working in all of these industries. And it's a
2 major source to get good high paying jobs. So it's a benefit
3 to everybody that we do that.

4 Q Uh-huh. Are you familiar with the Wiregrass region in the
08:48:15 5 Second District?

6 A I am. I told you earlier that I was a chancellor of
7 post-secondary education for the state of Alabama. And we had
8 three or four colleges in the Wiregrass region. We had a
9 number of vacancies in those colleges, so I had to go through
08:48:37 10 presidential searches. When you do a presidential search for a
11 community college, you have to involve the community. You have
12 to get involved with the community. You have to understand
13 that community.

14 So, for example, Lurleen B. Wallace Community College in
08:48:55 15 Andalusia, Alabama, that's Covington County, I spent a lot of
16 time in Andalusia because we had to build a vacancy there. So,
17 yes, I have spent a lot of time in the Wiregrass of Alabama
18 because of that position.

19 Q Tell me how the interest of the Wiregrass would compare to
08:49:13 20 the interest of the counties that are in the First
21 Congressional District.

22 A Well, what I described to you before is in the First
23 Congressional District southwest Alabama, something's built
24 around the water, okay? The Wiregrass is built around a couple
08:49:29 25 of things. Fort Rucker, which an Army helicopter training base

1 there in Ozark is a big part of the Wiregrass. Troy State
2 University is a huge part of the Wiregrass.

3 People in the Wiregrass sort of revolve around Dothan down
4 at the southern end and Montgomery at the northern end. And
08:49:53 5 they have agricultural interests that are different from the
6 agricultural interests that will be out here in southwest
7 Alabama. They don't have a nursery industry like we have here.
8 We have major wholesale nursery businesses here. They don't
9 have major watermelon crops. They don't have major pecan
08:50:13 10 crops. They're more built in to peanuts and cotton and cattle.

11 So they face, for example, during -- during in Andalusia,
12 Alabama, you face more towards Troy or Ozark or Dothan. You
13 don't face down here in southwest Alabama. In addition, it's
14 kind of hard to get from Mobile to the Wiregrass. We don't
08:50:36 15 have really good highway connections over there. So it's not
16 easy for people from there to come here or for people from here
17 to go there.

18 So they sort of face to the southeastern part of the
19 state. We face to the southwestern part of the state.

08:50:52 20 Q If you were representing the Second District, would you
21 focus on the same issues that you are focused on when
22 representing the First?

23 A No, sir. For example, I was on the Armed Services
24 Committee, and with the Navy shipyard, I am going to be focused
08:51:07 25 on Navy stuff.

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1 If I represented the Second Congressional District, I
2 would be focused on the Army and particularly Army helicopters.
3 That's what they do at Fort Rucker.

4 In this district, I was focused for higher education
08:51:21 5 reasons on the University of South Alabama. If I represented
6 the Second District, I would be focused on Troy. Now, Troy has
7 a different mission from the University of South Alabama. They
8 have an international presence. So working with Troy would be
9 very different from working for the University of South
08:51:36 10 Alabama. Troy doesn't have a medical school, but it has a
11 whole lot of other stuff that's pretty darn important. So
12 there would -- and the agricultural interests I just described
13 are very different.

14 So I would think being the congressman from the Second
08:51:51 15 District requires a different level of expertise and level of
16 expertise that I feel like I had to have to represent this
17 district.

18 Q I want to share another screen now, Mr. Byrne. And this
19 is Milligan Exhibit 3, page 7 of that exhibit.

08:52:11 20 These are some proposed congressional maps that one of the
21 plaintiffs' experts presented, I will represent to you,
22 Mr. Byrne.

23 Review just say these -- here's Plan A and B, and then I
24 will scroll down to Plan C and Plan D, as well.

08:52:29 25 Focus on any of those, and tell us what's your reaction

1 is. Do you see any issues with representing these districts?

2 A Yes. If you look at Plan A and Plan B, you see it takes
3 in part of Mobile County, all of Baldwin County, and then goes
4 east into the Wiregrass region. So you would essentially have to
08:52:56 5 become an expert on two different regions altogether, two
6 different communities of interest. I know that's important for
7 those proceedings.

8 Then if you look at that district just above it, that
9 district is essentially part of the Black Belt and part of
08:53:14 10 southwest Alabama. So the person representing that district
11 would essentially have to have two very dramatically different
12 sets of expertise. I think it would be very difficult to be
13 the congressman for either of those districts not just the fact
14 you would have this vast geographic area you would have to
08:53:33 15 cover, but you would be covering two very different communities
16 of interest.

17 Q Uh-huh. Why would it make it more difficult to represent
18 a district if it encompassed different communities of interest?

19 A Well, for example, if you represented that blue district
08:53:50 20 at the very bottom, you would have to be an expert on things
21 involving Navy shipyards and Army helicopter bases. You would
22 have to be an expert when it comes to agricultural issues like
23 everything from wholesale nurseries, watermelons, pecans, to
24 peanuts, cattle production, and cotton production. You would
08:54:13 25 have to be focused on two major universities that have very

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1 different missions. You would have to be focused on Dothan.
2 You would have to be focused on Andalusia. You would have to
3 be focused on Brewton, Mobile, and then all of Baldwin County,
4 which is the fastest growing county in the state.

08:54:30 5 So I am not saying you couldn't do it. It would be
6 extremely difficult to do it, and you would find yourself
7 somewhat diffused in your ability to be an effective advocate
8 for that region.

9 Q What do you mean by diffused?

08:54:44 10 A Well, there's only so many hours in the day for a
11 congressman and the staff that that congressman has. And there
12 are hundreds if not thousands of issues in Washington. And you
13 have got to figure out what your focus is going to be on. And
14 focus is very important for a member of Congress because
08:55:02 15 there's just not enough bandwidth, and there's only 435
16 congressmen, and you are one of them.

17 So you really have to figure out where am I going to put
18 my time? Where am I going to put the resources of my staff?
19 What fights am I going to fight. If you are fighting a whole
08:55:21 20 bunch of different fights because you have to, because you have
21 got that many interests in your district, you are not going to
22 be effective on each one of those. The more you can sort of
23 focus your energies, the more effective you will be.

24 I will give you an example. Everybody in the House of
08:55:32 25 Representatives and the staff and the leadership, et cetera

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1 knew that I was interested in a bridge across Mobile Bay,
2 fixing the snapper problem, and gaining the ships authorizing
3 and appropriated for the shipyard here. Literally, I had the
4 Speaker come up to me on the floor and say, we get it. It's
08:55:50 5 that bridge, it's those ships, and it's those fish. Now, when
6 they know that, they know they have got to make me happy on
7 that to get my votes. If they don't make me happy on that,
8 they are not going to get my votes.

9 Now, if I say I have 20 different things I want you to
08:56:03 10 make me happy on, they will say, look, I am not going to make
11 you happy on 20 things. You tell me what your priorities are.
12 We will help you get those things done, and then you will be a
13 part of the team. That's how it works. Anybody that tries to
14 be like out there fighting on every fight tends not to win any
08:56:22 15 fight.

16 Q Let's say you represented -- I guess I should show you the
17 maps again. If you represented a blue district, do you see any
18 difficulty in just getting around and visiting your
19 constituents?

08:56:35 20 A Yeah. It's a long way from Mobile to Dothan. Actually,
21 the way you get from Mobile to Dothan is that you get on
22 Interstate 10, you drive east through the Florida panhandle,
23 and then you get just north of Panama City you turn north. So
24 it's about a three to three-and-a-half hour drive from Mobile
08:56:58 25 to Dothan.

1 And north of there to Henry County, that's a county just
2 north of Houston County, it's even further than that. And so
3 in order to represent the people in Abbeville who deserve good
4 representation, even if you just visited there for an hour, you
08:57:13 5 would spend three-and-a-half, maybe four hours just to get
6 there and that much going back, so it's a long haul.

7 And the interests as I said of that southeastern part of
8 the state are very different than the interests in the
9 southwestern part of the state.

08:57:27 10 So when you finish with having your meetings in an area
11 like that, go back to Washington, you have to decide, all
12 right, what I am going to focus on? What are the priorities
13 for this sort of sprawling district with all these different
14 interests?

08:57:39 15 And somebody is going to lose out. That's just the way it
16 is. There's only so much bandwidth for a congressman, and that
17 person has to decide what am I going to focus on? Am I going
18 to help the shipyard in Mobile, or am I going to help Fort
19 Rucker?

08:57:54 20 Q Where do you think a congressman or congresswoman who
21 represented the blue district would want to have local offices?

22 A Well, you clearly want to have your main office Mobile,
23 but you want to have as pretty significant office as you can
24 afford in Dothan. You are only allotted so much money as a
08:58:13 25 congressman for your office, staff, and your office rent. So

1 you have got to spread that over Mobile and Dothan. And
2 Baldwin County is the fastest growing county in the state. You
3 have to have a presence in Baldwin County for a lot of
4 different reasons.

08:58:31 5 Then I guess you try to find some way to put something in
6 Andalusia. That's kind of more centrally located
7 geographically. But as I said, and I can say it's really hard
8 to get from here to Andalusia. Andalusia is a pretty hefty
9 drive from here. Not as far as Dothan, but it's still a hefty
08:58:51 10 drive because there's no good highway to get there.

11 Q Look at this yellow district or tan, the one above the
12 blue district.

13 Let's say there was a primary election in that district,
14 and someone was running to be the Democratic candidate, and
08:59:09 15 that someone was from Mobile. There was another person running
16 in the primary from Montgomery. Do you have any thoughts on
17 who might have a stronger base of support geographically?

18 A I would think that if you were from Montgomery, you would
19 have a stronger chance than if you're representing that part
08:59:29 20 that's in Mobile.

21 The Black Belt -- what those counties primarily look like
22 to me, the Black Belt is kind of its own thing. It's got very
23 rural, very agricultural. And they look more to Montgomery
24 than they look to Mobile for sure. So I would think somebody
08:59:50 25 from Montgomery would have a better shot at that district than

1 somebody from Mobile.

2 Q Do you think it possible, Mr. Byrne, if you had a map in
3 Plan A or Plan B that you could have, say, a congressman for
4 the blue district from Dothan or Andalusia and a congressman
09:00:10 5 for the yellow district from Montgomery so that you had no one
6 in Congress from the Mobile region?

7 A That could happen, yeah. It's kind of hard to know
8 exactly what parts of Mobile County are being taken with those
9 two plans. But if you dilute the vote in Mobile County, that
09:00:29 10 obviously is going to make the vote of the rest of that
11 district -- those two districts more important. So, yeah, you
12 could have a congressman from Dothan under both of those plans
13 and a congressman from Montgomery and not a congressman from
14 Mobile, which would be a tragedy for the people down here.

09:00:45 15 Q Why would it be a tragedy for the people down there?

16 A I'm not saying somebody from Dothan or Montgomery wouldn't
17 care about this area. But as I said before, you wouldn't have
18 somebody that's focused, focused on the port, focused on the
19 shipyard, focused on our fishery in the Gulf of Mexico, focused
09:01:01 20 on the nursery issues we have here. They just -- they're just
21 not enough bandwidth to be as focused as I was able to be
22 focused. I could walk in a room and talk about any of those
23 issues and master it. If I had to represent those other areas,
24 as well, or somebody from the other areas had to represent
09:01:22 25 Mobile, I just don't think that you could master it.

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1 Q Do Mobile and Montgomery ever compete each other, in terms
2 of trying to recruit businesses, for example?

3 A Not that I know of. Their economic development plan,
4 their industrial plan is very different from ours. Montgomery,
09:01:45 5 for all the right reasons, has really focused on two things --
6 automotive, obviously with the Hyundai plant there and all the
7 suppliers of the Hyundai plant, but also because of their Air
8 Force presence, they really focus on how they can magnify
9 Maxwell Air Force Base and things that are a part of that.

09:02:05 10 I think they have made a very smart decision to do that,
11 by the way, but that's a different economic plan than what we
12 have done here. So we're as much trying to help them because
13 of the port. So as anything else, I don't really think we
14 believe ourselves that we're competing with them.

09:02:23 15 Q Would you have any concerns with the congressional map
16 that divided the Mobile region along racial lines?

17 A Yes.

18 Q What would those be?

19 A Well, when you are a Congressman, you should be
09:02:39 20 representing everybody and thinking about how I do X is that
21 going to affect everybody in my district? You shouldn't be
22 thinking about, I am going to do this because it helps black
23 people, or I'm going to do this because it helps white people.
24 I am going to do this because it helps everybody. And if you
09:02:55 25 help everybody, everybody rises. That's what you want.

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1 Mobile is a little bit different from the rest of the
2 state. We do not have the same history during the Civil Rights
3 movement that Selma, Montgomery, Birmingham did. We had a
4 mayor here named Joe Lang who worked with a Civil Rights leader
09:03:14 5 down here named John LeFlore. And so we didn't have some of
6 the violence, the extent of the violence that you saw in the
7 other parts of the state. We tried to work through our issues
8 because we thought it was more important for us to work through
9 those issues and work together to try to figure out a way to
09:03:31 10 live together harmoniously. Were we perfect about it? No, we
11 did not. But we didn't have the problems you saw in the rest
12 of the state because we at least made the effort to work
13 together.

14 Q When you said that you worked -- that you served on the
09:03:47 15 state school board, correct?

16 A Yeah.

17 Q I want to share a map now which is Defendants' Exhibit 26.
18 This is the 2001 map, Mr. Byrne. I know -- I think you
19 were in the State Senate then, weren't you?

09:04:08 20 A In 2001, I was still on the state school board.

21 Q Okay. So which district did you represent in the state
22 school board?

23 A District number 1.

24 Q Thank you. Did you ever get calls from people in, say
09:04:25 25 District 5 when you were on the school board?

1 A I did. There was some people in Monroe County, I
2 remember, and maybe Clarke County who thought I was their state
3 school board member, and they would call me, and I would always
4 call the member for that district when they did and ask him or
09:04:42 5 her because it changed if they wanted me to help those people,
6 and they would say, please. And I would go up there and talk
7 with them and explain to them I was not their school board.

8 Q Now, I want to share a newer map. This is from Caster
9 Exhibit 1, which for the record, was Mr. Cooper's report. This
09:05:12 10 is page 19 of that report. And I will represent to you,
11 Mr. Byrne, this is the new state school board map that was
12 passed by the Legislature this cycle just a couple of months
13 ago.

14 What thoughts if any do you have about this map, in
09:05:26 15 particular, the way the blue district includes part of Mobile
16 and Baldwin County is constructed?

17 A Well, I testified before the Legislature Redistricting
18 Committee that I felt like Mobile and Baldwin County should be
19 kept whole and contiguous. So to the extent that this map
09:05:47 20 includes a district that comes from Montgomery all the way into
21 Mobile County, I didn't much like it.

22 Q Why did you not like it?

23 A Because Mobile County school system is the largest school
24 system in the state. And it has unique issues because it's the
09:06:06 25 largest in the state. And I felt like we needed a school board

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1 member who was focused on Mobile County as well as the other
2 counties. I had Baldwin and Escambia as well. But there were
3 so many issues with the Mobile County school system, a lot of
4 my time was spent focused on that. And if you break it up into
09:06:25 5 two different people, you don't really have that level of
6 focus.

7 I'm not saying that the people that represent those two
8 districts aren't working as hard as they can. I'm sure they
9 are. But it's very difficult to be focused on the Mobile
09:06:37 10 County school system if you have got almost all the Black Belt,
11 which that district up in the northern part is and a big chunk
12 of the Wiregrass, which the lower part of the -- the lower
13 district is.

14 Q Someone who has served both in Congress and on the state
09:06:56 15 school board, how do the roles of those two offices compare to
16 each other, Mr. Byrne?

17 A They're very different. You're on the state school board,
18 you are focused on educational issues. That's it.

19 Now, there are some work force development issues that go
09:07:13 20 with that, et cetera. But that's pretty much it. You are just
21 focused on educational issues. When you are in the United
22 States Congress, you are focused on a large number of issues.
23 I mean, it's almost everything comes within the purview of the
24 United States Congress from foreign policy, defense policy,
09:07:32 25 health care, to internal security, and education, as well. I

1 was on the Education and Labor Committee in the House of
2 Representatives. And one of the problems I had as a
3 congressman is that people expected you to be knowledgeable on
4 so many different things.

09:07:48 5 Now, at least you have got a staff in Congress. When I
6 was on the state school board, I had no staff. I had to rely
7 upon the staff of the State Department of Education, and they
8 had other things to do.

9 So it was difficult to me to be on the state school board.
09:08:03 10 But at least I could just focus on one set of issues and try to
11 master them.

12 And so it was very different being in both of those roles.
13 But I enjoyed both of those roles.

14 Q Considering the different roles between the school board
09:08:17 15 and the congressman, even if you assumed it made sense to split
16 Mobile County in a school board map, does that mean it would
17 make sense to do so in a congressional map?

18 A No. It would not make sense. At least on the school
19 board, you are focused on one set of issues. So if I'm from
09:08:38 20 Montgomery and I have got half of Mobile County from Mobile and
21 I have part of the Wiregrass, at least, I have got a
22 geographically diverse area. At least, I'm really only focused
23 on a very set, defined set of issues.

24 Now, they are very important issues. Don't get me wrong.
09:08:56 25 But at least I could focus on those issues and try to make sure

1 as I go from county to county that I am applying what I know on
2 these issues to each one of those counties as they are very
3 different.

4 Q When you campaigned for Congress in the different
09:09:11 5 elections, Mr. Byrne, what parts of your district would you
6 campaign in?

7 A All of them. I had a -- go ahead.

8 Q Would you campaign in areas that were both more -- would
9 you campaign in neighborhoods or areas that had a large
09:09:30 10 African-American community?

11 A Oh, yeah. You can't run for Congress in this district --
12 I will just make sure -- to be clear -- in this district
13 without touching every part of it. And I made a concerted
14 effort to go everywhere. In fact, if you look at my schedule,
09:09:49 15 I spent a disproportionate amount of my time in the more rural
16 areas than I did in more populated areas, because if you want
17 to go up to Monroeville, you might as well spend some time in
18 Monroe County.

19 There are parts of Monroe County that are almost
09:10:07 20 completely African-American. There's a little town in north
21 Monroe county called Beatrice that's 50/50. I had a town ball
22 in Beatrice. Someone said, why in the world would you bother
23 spending time in Beatrice because it's so small? I said they
24 deserve to be represented, too. So I went to all parts of my
09:10:25 25 district.

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1 Prichard probably didn't give me 5 percent of the vote in
2 my elections. I probably lost there by a huge margin. But I
3 would go and have town hall meetings and campaign in Prichard
4 because I believed the people in Prichard deserve to have a
09:10:42 5 good congressman.

6 Q When you ran for Congress, Mr. Byrne, did you run as a
7 candidate of any political party?

8 A Yes. I was a Republican.

9 Q Why are you a Republican, Mr. Byrne?

09:10:54 10 A Because the Republican Party is closer to the conservative
11 principles that I believe in than the Democratic Party is. I
12 started out as a Democrat, but I felt like by 1997 I guess is
13 when I switched parties, the Democratic Party had migrated away
14 from what were my principles. Not putting down the Democratic
09:11:15 15 Party if people are Democrats. I have friends who are
16 Democrats and work with a lot of Democrats, but I just felt
17 like the Republican Party is more closely aligned with where I
18 stood on issues and principles.

19 Q Did you work with Democrats when you were in Congress?

09:11:31 20 A Oh, yes. All the time. I will give you two examples. I
21 served on the Armed Services Committee. Every year, the only
22 bill the Armed Services Committee works on is the National
23 Defense Authorization, which we have passed out of the Congress
24 every year since John Kennedy was president. Those bills are
09:11:53 25 always bipartisan 100 years ago percent of the time. We work

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1 -- from the very beginning of the years, we work on that bill.
2 We consciously work together to make sure that bill, the bill
3 that authorizes the defense of this country is something that
4 we can all vote for.

09:12:08 5 So we work at being bipartisan, very much so.

6 The other example I give you is this: Shortly after
7 President Trump was elected, this "Me-Too" movement came out.
8 And we discovered that we have "Me-Too" problems in United
9 States Congress. But we also discovered that members of the
09:12:28 10 United States Congress weren't subject to the same processes
11 that the private sector was subject to under Title VII of the
12 1964 Civil Rights Act.

13 Now, I spent a career as a labor employment attorney
14 telling small, medium-sized businesses in Alabama what they had
09:12:44 15 to do to comply with that law. And here in Congress, the body
16 that passed that law was not holding itself under the same set
17 of accountability processes.

18 So I worked with a very liberal Democrat congresswoman
19 from California, Jackie Speier, and we put together a bill that
09:13:04 20 made Congress be as accountable, even more accountable than we
21 hold people in the private sector, and that bill that Jackie
22 and I put together passed the United States House unanimously,
23 passed the United States Senate unanimously, and is a law of
24 the United States now. And those are just two examples.

09:13:20 25 I worked all the time in a bipartisan manner, because I

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1 firmly believe that the best legislation in Washington is
2 bipartisan legislation. The hardest legislation to pass in
3 Washington is partisan legislation. And it's always a problem,
4 always.

09:13:36 5 So I enjoyed working the bipartisan fashion. I know you
6 look up there now and think, they're completely divided. They
7 can't get along. And there are problems. Don't get me wrong.
8 But there are still people up there, former colleagues of mine
9 on both sides of the aisle that understand what I say is true,
09:13:53 10 and they're still trying to work together to make things happen
11 and happen in the right way.

12 Q When you served on the delegation with Congresswoman
13 Sewell for the Seventh District, did you have the opportunity
14 to work with her on any issues?

09:14:09 15 A Oh, all the time. All the time. We shared Clarke County.
16 We actually had joint town halls together.

17 If she had an issue that affected her district, you know
18 uniquely, she would call on the other members of the delegation
19 to help her, and we always did, 100 years ago percent of the
09:14:26 20 time. And she always helped us. We all worked together. It
21 wasn't like it was unique to her.

22 So Terry was a part of a group called Faith and Politics.
23 I assume she is still a part of it. That's the group that
24 brings the pilgrimage to Alabama every year around the
09:14:47 25 anniversary of the Edmund Pettus Bridge March from 1965. She

1 wanted to make sure that when that group came here to Alabama,
2 which would bring couple hundred people, people from Congress,
3 people from business and industry, people from foundations, she
4 wanted to make sure that we were all working together, that
09:15:08 5 they saw Alabama, the Alabama delegation working together.

6 So I always participated in that pilgrimage with her.
7 Usually on Saturday mornings when she did her program either at
8 Brown Chapel in Selma or the Dexter Avenue Baptist Church in
9 Montgomery, she would ask me to be sort of her sidekick for it,
09:15:27 10 so that we could get up and tell the people from all the other
11 parties of America here's a Democrat and Republican, black
12 woman and white man working together on issues that matter to
13 the people of Alabama, in particular, matters that revolve
14 around Civil Rights.

09:15:40 15 And I was always honored that she felt comfortable enough
16 to ask me to do that. And I can tell you, you can sit in that
17 room with some of the people in that room like John Lewis who
18 we lost last year, and you realize what people in this state
19 went through to get us the quality of life we have got today --
09:15:58 20 to get to today. I feel like a little bitty nothing compared
21 to people like that. But it was an honor always to be with
22 Terry and to work with her on -- whether it's the pilgrimage or
23 other things that were important to our district.

24 Q When you were in Congress, Mr. Byrne, were there any
09:16:17 25 issues you worked on to devote your time and your political

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1 capital towards that you thought and expected to have a
2 particular benefit to your African-American constituents?

3 A Just about everything. If I am doing something that's
4 going to benefit the economy in southwest Alabama, it's going
09:16:36 5 to benefit African-Americans in my district, of course, it is.

6 If you go to the various businesses in this area, and I
7 traveled and met with workers in every one of these industries.
8 It was always black and white. That's the nature of our work
9 force down here. I mean, whether you are at a chemical plant,
09:16:56 10 steel plant, ship building plant, airplane, you are going to
11 have a mixed group of people.

12 So every time I was doing something for the economy. But
13 I particularly felt like I was helping them every time we
14 worked on education issues. And this goes back to my state
09:17:13 15 school board days. I think the number one Civil Rights issue
16 in Alabama today is the fact that we don't give a quality
17 education to black people like we do the white people. And I
18 really feel strongly about that. We are not going to have the
19 sort of gains and advances and progress we need in this state
09:17:30 20 until we make more improvements to our education system.
21 That's true across the country, but I am more focused on
22 Alabama.

23 Q Have you spent any time working with HBCUs, Mr. Byrne?

24 A Yes, sir. HBCUs are historically black colleges and
09:17:48 25 universities. We had several of them in the two-year college

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1 system in Alabama include Bishop State here in Mobile. So when
2 I was on the state school board, I worked with them. When I
3 was chancellor of post-secondary education I worked with them.
4 And by the way, including Tuskegee, and then when I got to
09:18:06 5 Congress, a congresswoman from North Carolina named Alma Adams
6 asked me to be a co-chair with her of the HBCU Congressional
7 Causas. So for five years I guess it was, I was the co-chair
8 of the HBCU Congressional Caucus.

9 Q Did you spend time working on community health centers?

09:18:33 10 A Oh, yes. We have several community health centers here in
11 the district. I've gotten to know them pretty well. I am very
12 impressed with the quality of health care that they provide to
13 their patients. And I was a strong advocate for them and
14 continue to be a strong advocate for them because I think that
09:18:56 15 they provide quality health care close near where people live,
16 so it's community plan, and it's the best way I think to get
17 primary health care to people in those communities. So I am a
18 strong supporter of community health center.

19 Q Back to your co-chairmanship on the HBCU caucus, I am not
09:19:21 20 suggesting this was the reason you did it, but did you receive
21 any recognition for your service in that area?

22 A I did. The Thurgood Marshall Fund gave me an award
23 three years. Probably one of the awards that I am the most
24 proud of. Thurgood Marshall Fund works to provide funding,
09:19:40 25 private funding to HBCUs across America. And I had no idea

1 they were going to give me an award, and it just knocked me out
2 when they did. I remain in contact with them. I still
3 continue to work with them even though I am not in Congress
4 because I am a huge believer in HBCUs, and I think what the
09:19:59 5 Thurgood Marshall Fund is doing and the United Negro College
6 Fund, both of them together are doing great work for those
7 colleges, and I think they are important to America.

8 Q Just a few more questions, Mr. Byrne. And I will remind
9 you. We want to make sure the Court understands your testimony
09:20:15 10 that Ms. Decker can take it down. We will try to slow down
11 just a little. I want to -- when you were in Congress, did you
12 consider yourself to be the representative of both Republicans
13 and Democrats in your district?

14 A Yes.

09:20:30 15 Q Did you consider yourself to be the representative of both
16 the white and African-American constituents in your district?

17 A Absolutely, yes.

18 Q I want to share a screen now, Mr. Byrne. This is Milligan
19 Exhibit 5. It is the report of one of their experts, Dr. King,
09:20:57 20 and she is offering opinions on certain issues. I want to read
21 this introduction section into the record so you can get some
22 context. Dr. King writes, White law makers in Alabama learned
23 long ago to color mask their public statements, just as they
24 have learned to color mask the legislation intended to protect
09:21:22 25 their racial prerogatives.

1 Not since the high tide of brazen white supremacy when
2 George Wallace proclaimed, segregation forever, have public
3 figures been so bold.

4 MS. WELBORN: Mr. Davis, this is Dr. Bagley's report,
09:21:43 5 not Dr. King's report.

6 MR. DAVIS: I apologize for that confusion. Yes.
7 Thank you for the correction.

8 BY MR. DAVIS:

9 Q Then Mr. Bagley after giving some examples says this.

09:22:03 10 JUDGE MARCUS: I think you have to just -- as we
11 proceed, Mr. Davis, just take your time and speak right into
12 the speaker.

13 MR. DAVIS: Thank you, Judge.

14 BY MR. DAVIS:

09:22:16 15 Q I will read now an excerpt into the record from Milligan
16 Exhibit 5, the Bagley report.

17 Dr. Bagley writes, Representative Bradley Byrne of the
18 State's First Congressional District when he was vying for a
19 Senate seat aired a campaign ad in which he condemned black
09:22:36 20 people by placing their images in a fire.

21 The television spot begins with Byrne staring into a wood
22 fire in a backyard and lamenting the loss of his brother in the
23 armed services. He shifts to lamenting the course the country
24 is taking as the faces of black and brown people appear in the
09:22:56 25 fire. Former national football league quarterback Colin

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1 Kaepernick appears in the fire as Byrne calls him an entitled
2 athlete dishonoring the American flag. Members of the
3 congressional caucus known as the Squad, Ilhan Omar and
4 Alexandria Ocasio Cortez appear in the fire and are accused of
09:23:17 5 attacking America and cheapening 9/11. No white people appear
6 in the fire.

7 My question to you, Mr. Byrne, is: Is there anything you
8 care to say in response?

9 A Yes, sir. That ad was about my brother. And the fire was
09:23:38 10 a fire in the fire pit at our hunting camp that he and I used
11 to sit around all the time. So that ad was about my brother.

12 Now, the fact that I'm contrasting a rich, NFL quarterback
13 named Colin Kaepernick who won't stand up during the national
14 anthem with my brother's service who made far less than Colin
09:24:01 15 Kaepernick makes and literally contracted a disease during one
16 of his deployments with the 20th Special Forces group that
17 killed him, I think that's a legitimate thing for me to raise.
18 I have grave disagreements with Representative Alexandria
19 Ocasio Cortez and Representative Omar. But I can tell you I
09:24:18 20 never had any negative interaction with either one of them.

21 Representative Alexandria Ocasio Cortez, actually, her
22 office was in my office building. And when she was relatively
23 new, she couldn't find her way to her office and literally
24 stopped me in the hallway and asked me, can you tell me where
09:24:36 25 my office is? I said, yes, ma'am, and I told her where it was.

1 And we sort of developed a personal rapport just because she
2 got to the moment of weakness, which we all have in Congress by
3 the way. It's easy to get lost in those buildings.

4 So we never really had a political conversation, but we
09:24:50 5 would have these personal sort of, you know, informal social
6 interactions. I disagree with her on the issues, but I don't
7 have any problems with her as a person.

8 The same is true for Ms. Omar. Now, Ms. Omar served on
9 the Education and Labor Committee with me. So we would have
09:25:07 10 interactions about education issues, and we had some
11 disagreements about -- but there was no -- that was really
12 about my brother. It was not about those other people. And
13 the fact that we used them was to simply contrast them and
14 their positions with the service that my brother had rendered
09:25:29 15 to our country.

16 Q Was it your intention to single out anyone because of
17 their race?

18 A No. I singled out Mr. Kaepernick because he won't stand
19 up during the national anthem, and there are plenty of black
09:25:43 20 athletes that stand up during the national anthem by the way.
I have noticed that's not as what a lot of people try to
22 portray it to be.

23 And I am singling out Ms. Alexandria Ocasio Cortez and
24 Ms. Omar because of their attacks against America. They attack
09:25:56 25 American values. And I think it's perfectly within the realm

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1 of what's appropriate dialogue to say, I expect somebody that's
2 making this money as Colin Kaepernick to stand up during the
3 national anthem, and I don't think members of Congress should
4 be attacking the country.

09:26:12 5 Q Mr. Byrne, I want you to think of the people who are
6 involved in congressional campaigns, whether it's a candidate
7 or someone considering a run, that person's staff, volunteers,
8 and then I want you to assume that a couple of weeks before the
9 January 28th deadline, the congressional map changes from the
09:26:40 10 way it's usually been and what the Legislature passed to all of
11 a sudden it changes to something like what the plaintiffs are
12 representing excuse me -- what the plaintiffs are proposing.

13 Do you see any issues that would cause with congressional
14 campaigns?

09:26:57 15 A Yes, sir. First of all, we have primaries in four months,
16 general election in ten months. Once you turn the calendar to
17 the beginning of the year, you have that primary staring you in
18 the face, you have already set your campaign in place. You
19 already have your plan in place. You have already got
09:27:17 20 volunteers set up ready to go. You have got, you know, the
21 campaign ad messaging already worked out. And you are hitting
22 the ground running.

23 So if you change my district on me with that little time,
24 it's going to put a substantial burden on my ability to refocus
09:27:33 25 my campaign, conduct my campaign, get volunteers, et cetera.

1 And particularly if you give me a new geographic area that I
2 haven't represented before, where I don't have, you know, the
3 natural contacts, et cetera, that's a huge problem for any
4 community. And I don't -- and that's true for any candidate,
09:27:52 5 Democrat, Republican, people that are long-time public office
6 holders, people that are brand new. It could be a tremendous
7 difficulty.

8 Q Mr. Byrne, you said you went to a public hearing where
9 some of these districts were at issue. Why did you go to the
09:28:13 10 public hearing? Why are you here today to talk to the Court
11 about districts?

12 A Number one, I am a citizen, so I have -- so I am not just
13 any citizen. I mean, I served on the state school board, held
14 a district for eight years. I served in the United States
09:28:33 15 House of Representatives representing one of the districts for
16 seven years. I have, you know, a unique set of understandings
17 about what it's like to represent these areas. And I felt like
18 I owed it to the system. I owed it to the public to stand up
19 and say -- as somebody that's actually done this work, these
09:28:51 20 districts the way I'm proposing them makes sense this way.

21 And the most important thing I was trying to say is keep
22 this particular community together. Keep these communities
23 together. Don't pull southwest Alabama apart because we work
24 together down here. Mobile area Chamber of Commerce doesn't
09:29:13 25 just do economic development for Mobile County. They also do

1 it for Washington County.

2 JUDGE MARCUS: Let me stop you for a second,
3 Mr. Byrne. You cut out. The sound cut out for a minute. So
4 take your time and just repeat what you just said if you would,
09:29:29 5 please.

6 THE WITNESS: Yes, sir. What I have been the most
7 concerned about is that people that pull apart southwest
8 Alabama and have different parts being represented -- we work
9 together down here in southwest Alabama. The example I used
09:29:48 10 was the Mobile area Chamber of Commerce, the economic
11 development for both Mobile County and Washington County,
12 because we're so closely connected.

13 We need to stay together down here. We have a group
14 called CAP, Cultural Alabama partnership, that pulls together
09:30:05 15 these counties so that we have common representation, common
16 advocacy efforts with the Alabama Legislature and the members
17 of Congress. So keep us together. Don't pull us apart. Let
18 us be one group of people that work together for our region of
19 the state and maximize the benefits that we want to get for our
09:30:27 20 people down here.

21 MR. DAVIS: Thank you, Mr. Byrne. I have no further
22 questions and pass the witness at this time.

23 JUDGE MARCUS: Thank you, counsel. Cross-examination
24 in what order did you propose to proceed on behalf of Milligan
09:30:40 25 and Caster and the Singleton? And we leave that up to you.

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1 MS. WELBORN: I will be going first for the Milligan
2 plaintiffs, Your Honor.

3 JUDGE MARCUS: All right. And, Mr. Whatley, would you
4 be going second or the Caster folks going second?

09:30:57 5 MR. WHATLEY: Doesn't matter to me, Your Honor.

6 JUDGE MARCUS: I leave that up to you. So let's
7 begin --

8 MR. WHATLEY: I am happy for the Caster plaintiffs to
9 go second.

09:31:03 10 JUDGE MARCUS: All right. Thanks very much.

11 Ms. Welborn, you may proceed with your cross-examination.

12 MS. WELBORN: Thank you.

13 CROSS-EXAMINATION

14 BY MS. WELBORN:

09:31:10 15 Q Representative Byrne, my name is Kaitlin Welborn, and I
16 represent the Milligan plaintiffs. Good morning.

17 A Good morning.

18 Q So I'd like to talk about the current redistricting plan
19 first. You had no direct role in drawing the current
09:31:25 20 congressional map in Alabama, right?

21 A I didn't have any direct role, but I did testify before
22 the committee.

23 Q But other than that, you did not do anything to --

24 A That's correct.

09:31:37 25 Q -- help draw the congressional map?

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1 A That's correct.

2 Q And you did not provide any input to Mr. Hinaman, the map
3 drawer?

4 A I did not know Mr. Hinaman.

09:31:49 5 Q I'm sorry?

6 A I don't think I know him.

7 Q Okay. And you did not speak with Representative Pringle
8 about the 2021 map?

9 A I did.

09:31:59 10 Q You did?

11 A Yes.

12 Q I'm sorry?

13 A He is the chair of the committee, and I testified before
14 the committee.

09:32:08 15 Q Okay. But did you speak to Representative Pringle outside
16 of the public hearing?

17 A I don't believe I did, no.

18 Q Okay. And did you not speak with Senator McClendon
19 outside of the public hearing?

09:32:22 20 A I don't believe I did, no.

21 Q And you did not speak with Secretary Merrill's expert
22 Thomas Bryan?

23 A No, ma'am.

24 Q Okay. You first ran for Congress in a special election in
09:32:34 25 2013, right?

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1 A That's correct.

2 Q And at that time, you had already held state office in
3 Alabama for some time as you had mentioned, right?

4 A That's correct.

09:32:44 5 Q So you were something of a known quantity to the voters in
6 your district?

7 A Well, I thought I was better known than I found out that I
8 was, but, yes, to some people, I was a known quantity.

9 Q And in the 2013 special election, your opponent,
09:33:05 10 Mr. LeFlore was black, right?

11 A That's correct.

12 Q And he lost to you by over 30 percent?

13 A I don't remember the percent.

14 Q And then you faced Mr. LeFlore again in the 2014 general
09:33:20 15 election?

16 A That's right.

17 Q And at that time, he lost to you by over 35 percent?

18 A Once again, I don't remember the percent.

19 Q Okay. As a congressional representative, don't you have
09:33:35 20 to focus on multiple issues all at once?

21 A You do.

22 Q And you have to learn about all of the issues that matter
23 to your constituents?

24 A You do, but there's some issue you know more about than
09:33:49 25 others to be honest with you. You can't be an expert on

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1 everything.

2 Q And some Representatives in Congress represent entire
3 states, right?

4 A That's true.

09:33:57 5 Q Is it impossible to be knowledgeable about, for example,
6 both the University of South Alabama and Troy University at the
7 same time?

8 A Well, you can be knowledgeable about them, but you can be
9 more knowledgeable about one than two.

09:34:15 10 Q Okay. Wouldn't having two congressional representatives
11 representing Mobile and Baldwin give the region even greater
12 influence in Congress?

13 A Well, the truth of the matter is if you have two different
14 ones, you don't have one that's just entirely focused on a
09:34:33 15 particular interest. So --

16 Q No. You have two that are focused on that area?

17 A Unfortunately, when you have two, you don't have the same
18 amount of focus. That's just the honest truth about it. So if
19 I am only concerned about the University of South Alabama, I
09:34:47 20 know I am the congressman for the University of South Alabama,
21 and they don't have anybody but me to go up there and do what
22 needs to be done for them. And so it really is better to have
23 just one than to have two that are sort of split and paying
24 attention to other things.

09:35:02 25 Q Representative Sewell and Palmer both live in Birmingham,

1 right?

2 A I don't think -- I know Representative Sewell lives in
3 Birmingham. I think Representative Palmer lives outside of
4 Birmingham, but in the metro area.

09:35:24 5 Q In Jefferson County?

6 A Yeah.

7 Q Okay. Are you aware of any criticisms of either of those
8 representatives failing to adequately represent the rest of
9 their districts?

09:35:35 10 A I've never heard anybody criticize either one of them for
11 what they do for their district. Each one of them in their own
12 way do an excellent job for their district.

13 Q Okay. Are you aware that District 4 stretches across the
14 northern part of the state from Lamar and Tuscaloosa counties
09:35:53 15 all the way east to Etowah and Dekalb counties?

16 A I am. I believe that's Congressman Aderholt's district.

17 Q That's right. It's Congressman Aderholt.

18 And presumably, Representative Aderholt campaigns
19 everywhere in his district, right?

09:36:10 20 A I don't know where he campaigns, but Congressman Aderholt
21 like Congresswoman Sewell and Congressman Palmer, does an
22 excellent job in his district.

23 Q I would like to talk about the economics of the Mobile
24 area.

09:36:22 25 You spoke quite a bit about the port in Mobile. Does

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1 Republican Carl your successor also work to protect ship
2 building in Congress?

3 A Yes, ma'am. He is doing a good job.

4 Q Wouldn't you expect anyone who represented Mobile to work
09:36:39 5 to protect the ship building industry in Congress?

6 A Oh, I think that's true. The question is, once again,
7 it's bandwidth. How much time can you devote to that issue if
8 you have got other competing issues? So I can't say this about
9 Congressman Carl because I am not there with him all the time.
09:36:58 10 But for me, every day that I woke up in Congress, I was
11 concerned about that shipyard. And that's what it took because
12 there were all sorts of people trying to take the money away
13 from those programs that they were building ships for, for
14 other programs. And it was a fight every day just like the red
09:37:14 15 snapper fight was a fight every day.

16 Now, if I have got to worry about several other issues in
17 addition to those, I am not going to be as effective in that
18 fight as I would be if I'm focused on those.

19 Q Okay. But if the port in Mobile were in a different
09:37:30 20 district than CD 1, it would still be true that someone would
21 work to represent, you know, the ship -- protect the ship
22 building industry in Congress?

23 A I would think so, but I would think it would be a question
24 of how much time, how much effort, and how much priority they
09:37:46 25 put on it. And if they have got other things they are

1 competing with, it wouldn't be as much. That's just the nature
2 of things.

3 Q Okay. And other than the port, you mentioned a few other
4 industries such as Airbus and fishing, and said that those are
09:38:05 5 some of the largest industries in the Mobile area, right?

6 A Yeah. I also mentioned tourism and seafood, et cetera.

7 Q Okay. The largest industry in Mobile County is health
8 care; is that right?

9 A I guess if you put all the hospitals together, it might --
09:38:26 10 that might be true, yeah.

11 Q And the second largest industry is retail sales; is that
12 right?

13 A In terms of numbers of employees, that may be true. I
14 don't know about payrolls.

09:38:36 15 Q Okay. And the recent economic growth in Mobile County has
16 attracted more people to move to the Mobile area; is that
17 right?

18 A That's correct.

19 Q And people go to Mobile County from other counties to
09:38:50 20 work?

21 A Oh, yes. A lot of people do.

22 Q And to live?

23 A Yes.

24 Q And to shop?

09:38:57 25 A Oh, yes.

1 Q And those people may come from Clarke County?

2 A Yes.

3 Q Conecuh County?

4 A Not too many people from Conecuh County.

09:39:10 5 Q Okay. What about Wilcox County?

6 A Not very many people from Wilcox County.

7 Q And migration from other areas would include people moving
8 from the area commonly known as the Black Belt, right?

9 A There are people that move here from the Black Belt, yes.

09:39:28 10 Q Okay. You don't know the level of migration into the
11 Mobile area in the past decade, do you?

12 A You mean where they came from?

13 Q The level of migration.

14 A The level. Oh, I couldn't quantify it for you, but we
09:39:45 15 have had migration.

16 Q Or the past 50 years?

17 A We have had migration the last 50 of years, yes.

18 Q But you don't know the level?

19 A No, I can't quantify for you.

09:39:56 20 Q And you don't have a breakdown of where those migrants
21 have come from?

22 A No, ma'am.

23 Q Are you aware of the racial disparities in the poverty
24 level in Mobile?

09:40:08 25 A You mean the percentage of people who are in poverty who

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1 are black versus white?

2 Q Yes.

3 A I know that it's a higher percentage poverty among black
4 people than white people in Mobile County.

09:40:26 5 Q Are you aware that over 51 percent of people living below
6 the poverty line in Mobile County are black, even though only
7 36 percent of Mobile County is black?

8 A I don't know the figure precisely, but I wouldn't be
9 surprised if that was the case.

09:40:43 10 Q Okay. Are you aware that the Mobile City Council had to
11 be sued in the 1970s and 1980s to ensure black representation?

12 A I am well aware of that, yes, ma'am.

13 Q And are you aware that the Mobile County School Board had
14 to be sued in the 1970s and 1980s to ensure black
09:41:01 15 representation?

16 A I am well aware that, yes, ma'am.

17 Q You mentioned representative John Lewis and the
18 commemoration of the Selma to Montgomery March?

19 A Correct.

09:41:13 20 Q But you did not support the John Lewis Voting Rights
21 Advancement Act while you were in Congress, did you?

22 A I did not.

23 Q You are familiar with the area referred to as the Black
24 Belt, right?

09:41:29 25 A Oh, yes, ma'am.

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1 Q And the Black Belt is generally an area whose counties are
2 generally majority black, right?

3 A It's actually called the Black Belt because of the soil.
4 The soil is dark and rich there, so it's not called the Black
09:41:44 5 Belt of race or ethnicity.

6 Q That's not what I asked. Is it an area whose counties are
7 generally majority black?

8 A Yes. There are some exceptions to that, but yes, as a
9 region, it's majority black.

09:42:00 10 Q Okay. And in general, the Black Belt has lower income
11 levels than other areas of the state, right?

12 A Yes, ma'am, that's correct.

13 Q And it has lower education levels than other areas?

14 A There are exceptions to that, but that's true.

09:42:17 15 Q And it has worse health care and facilities than other
16 areas?

17 A I don't know that. I have toured hospitals in the Black
18 Belt, and there the number of good hospitals in Black Belt, so
19 I can't verify what you just said.

09:42:28 20 Q Okay. That's perfect, because I would like to talk about
21 health care now.

22 In December 2020, you were interviewed by al.com about
23 your time after Congress. Do you recall this interview?

24 A Well, yeah, I did a lot of interviews when I was a member
09:42:45 25 of Congress, but I do recall generally that interview.

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1 MS. WELBORN: Mr. Ang, could you bring up that
2 article?

3 BY MS. WELBORN:

4 Q Mr. Byrne, do you recognize this article?

09:42:55 5 A It's been a while since I've read it, but, yes, John
6 Sharp. I remember the article he wrote, yeah.

7 MS. WELBORN: Your Honor, we would like to mark this
8 document as Milligan Plaintiffs' Exhibit 55 for identification.

9 JUDGE MARCUS: Okay.

09:43:12 10 MS. WELBORN: Mr. Ang, could you flip to page 2,
11 please?

12 BY MS. WELBORN:

13 Q And, Republican Byrne, could you please read the paragraph
14 starting with, the daily data?

09:43:24 15 A The daily data that I've got in this -- which really
16 forced me to focus on the fact that there is a problem with the
17 ability of black people to be able to get good, primary health
18 care. One thing I have worked on in Congress and will continue
19 to be interested in, is how do we get primary health care to
09:43:43 20 black people? It's clear with the data we have is that black
21 people with underlying health conditions are disproportionately
22 affected by the novel Coronavirus virus. We should want
23 everyone in our communities to have real access to quality
24 primary health care.

09:44:01 25 Q Thank you.

1 MS. WELBORN: And, Mr. Ang, could you flip to the last
2 page, please?

3 BY MS. WELBORN:

4 Q And, Representative Byrne, could you read the paragraph
09:44:11 5 starting with, many of us have access?

6 A Many of us have access to primary health care, and we take
7 that for granted, but for a disproportionate number of people
8 in the state, and a disproportionate number of black people,
9 that's not true. It's not good for our communities, for our
09:44:27 10 state, or our nation.

11 Q Thank you.

12 MS. WELBORN: And, Mr. Ang, you can take that down.

13 BY MS. WELBORN:

14 Q Representative Byrne, do you agree that it is difficult
09:44:37 15 for black people in Mobile County to get primary health care?

16 A Yes, ma'am.

17 Q And would you agree that it is difficult for black people
18 in the Black Belt to get primary health care?

19 A I don't know as much as the Black Belt as I do about
09:44:51 20 Mobile County, but I wouldn't be surprised if that was true.

21 Q Okay. Thank you. You are aware that the Affordable Care
22 Act allows states to opt in to Medicaid expansion, right?

23 A I am.

24 Q And you are aware that Governor Bentley convened a task
09:45:07 25 force that recommended that Alabama opt into Medicaid

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1 expansion, right?

2 A I don't know about that.

3 Q Okay. But Alabama has not opted into Medicaid expansion?

4 A That's correct.

09:45:20 5 Q And if Medicaid were expanded in Alabama about, 220,000
6 more Alabamians would receive health care coverage; is that
7 right?

8 A No.

9 Q I'm sorry?

09:45:35 10 A I said no.

11 Q Okay. Do you have a different figure?

12 A No. I think what you are saying is they would be covered
13 by Medicaid, but it doesn't mean they would have access to
14 health care because there are not enough health care providers
09:45:51 15 to provide health care to.

16 Q I'm sorry. I'm talking about health care coverage, so
17 insurance?

18 A It's a difference between coverage and gaining health
19 care.

09:45:59 20 Q Okay. 220,000 more Alabamians would be covered by
21 Medicaid and have Medicaid insurance?

22 A Yes. But they wouldn't necessarily be able to get health
23 care because we don't have doctors that will take care of them.
24 We have --

09:46:14 25 Q Thank you.

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1 A We have one pediatrician in Escambia County, Alabama that
2 will take Medicaid patients because the level of pay is so low
3 for Medicaid. So you can have Medicaid and not be able to get
4 health care because there's no doctor to give it to you.

09:46:29 5 That's --

6 Q Okay. Thank you.

7 A -- why I support community health centers.

8 Q But of those 220,000 Alabamians who would be covered under
9 Medicaid in that they have Medicaid insurance, black people
09:46:44 10 would disproportionately be among those at those people, right?

11 A I don't know that figure. I couldn't -- I couldn't
12 quantify that.

13 Q And while you were in office, you opposed Medicaid
14 expansion, right?

09:46:55 15 A I did because I thought we should have community health
16 centers instead.

17 Q Okay. And Representative Sewell supports Medicaid
18 expansion?

19 A She does.

09:47:04 20 Q And that Alabama Black Legislative Caucus supports
21 Medicaid expansion?

22 A I don't know.

23 Q Okay. In Congress, you made opposition to the Affordable
24 Care Act a major priority; is that fair?

09:47:19 25 A I did.

1 Q And you sponsored a 2015 bill to repeal the Affordable
2 Care Act?

3 A Repeal and replace.

4 Q And in 2017, you supported a budget revolution to appeal
09:47:32 5 the Affordable Care Act?

6 A That's correct.

7 Q Do you recall the American Health Care Act of 2017?

8 A I do.

9 Q And it sought to repeal the Affordable Care Act, as well,
09:47:44 10 right?

11 A Repeal and replace.

12 Q And you supported the American Health Care Act, right?

13 A Yes, because I thought it was going to give a better
14 health care system than the one that the Affordable Care Act
09:47:57 15 provided.

16 Q Okay. Thank you.

17 Do you know what percentage of black voters voted for you
18 in the 2014 and 2018 general elections?

19 A I don't.

20 Q Would it surprise you that in your 2014 election only
21 15 percent of black voters in District 1 voted for you?

22 A No.

23 Q And would it surprise you to know that in 2018 only
24 5.4 percent of black voters in District 1 voted for you?

25 A That would surprise me, yeah.

1 Q Okay.

2 MS. WELBORN: I believe I have no further questions,
3 but if I could please confer with my colleagues for a few
4 minutes.

09:48:40 5 JUDGE MARCUS: You may.

6 MS. WELBORN: Thank you.

7 We have no further questions. Thank you.

8 JUDGE MARCUS: All right. Thank you. And you may
9 proceed, Mr. Osher.

09:49:09 10 MR. OSHER: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. OSHER:

13 Q Good morning, Representative. How are you?

14 A Good morning. I'm well, thank you.

09:49:17 15 Q Can you hear me okay?

16 A I can.

17 Q Great. My name is Dan Osher. I represent the Caster
18 plaintiffs in this lawsuit. I think we met a few years ago
19 during the *Chestnut* litigation where you testified. Do you
09:49:29 20 remember that?

21 A I do.

22 Q Great.

23 Representative, how long did you serve in Congress?

24 A Seven years.

09:49:38 25 Q And during that time and when you were campaigning, did

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1 you reach out to your constituents to try to learn what their
2 interests and needs were?

3 A Constantly.

4 Q I'm sorry. I didn't catch that answer.

09:49:52 5 A Constantly.

6 Q What about organizations that served your constituents,
7 did you reach out to meet with any such organizations?

8 A Typically, they would reach out to me. So somebody
9 reached out to me and said, will you come speak to our group,
09:50:05 10 or can we come meet with you? I would say, yes.

11 Q Okay. You mentioned Airbus during your testimony. That
12 is a pretty big presence in Mobile; isn't that right?

13 A Yes, sir.

14 Q Did you ever seek out a meeting to meet with
09:50:21 15 Representatives from Airbus?

16 A No. They sought out meetings with me.

17 Q So you never reached out to them during your candidacy or
18 serving Congress?

19 A I didn't have to. They reached out to me.

09:50:34 20 Q Fair enough.

21 What about Austal, did you ever reach out to them?

22 A Yes, sir, but that was part of the back and forth in
23 trying to get ships authorized and appropriated. So I would
24 initiate conversations with them and tell them this is what
09:50:50 25 just happened or what's about to happen.

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1 Q Sure. And that was a huge project in your district,
2 right? I believe you spent a lot of time on that?

3 A Yes, sir. A lot of time.

4 Q Any other of the companies that you identified in your
09:51:01 5 direct examination, did you reach out to any of those while you
6 were serving or campaigning?

7 A I would probably each reach out to the University of South
8 Alabama because I was on the education committee, and I was
9 trying to -- but in general, if I spoke with companies, that
09:51:22 10 would have been because they or somebody representing their
11 industry reached out to me.

12 Q Sure. Busy guy. I wouldn't dispute that. So you
13 testified in the *Chestnut* trial while you were in office you
14 never had a formal reading with the Alabama State Conference of
09:51:42 15 the NAACP; isn't that right?

16 A That's correct. They never reached out to me.

17 Q And you never reached out to them?

18 A No.

19 Q And you didn't know who the president of that organization
09:51:55 20 was when you testified in *Chestnut*; is that right?

21 A Yes, sir.

22 JUDGE MARCUS: Give him a chance to complete his
23 answer. You may proceed, Mr. Byrne.

24 THE WITNESS: I still don't know.

09:52:09 25 BY MR. OSHER:

1 Q And you testified in *Chestnut* that you never held a
2 meeting with anyone from the Urban League while you were in
3 office, right?

4 A That's correct. They never reached out to me.

09:52:21 5 Q And you never reached out to them?

6 A That's right.

7 Q And you testified in *Chestnut* you never met with anyone
8 from the Southern Christian Leadership Conference; isn't that
9 right?

09:52:31 10 A Not that I am aware of.

11 Q And you testified in *Chestnut* that you never had a meeting
12 with anyone from the National Coalition of Black Civic
13 Participation; isn't that right?

14 A That's correct. Now, I think what I said in that trial
09:52:43 15 and I will say again today is I may have met with those people
16 when I was somewhere else. Like I may have met with them in
17 Selma during the pilgrimage, but I didn't meet with them as
18 members of organizations. It was part of a bigger meeting.

19 Q Of course. Understood. And you testified in *Chestnut*
09:53:03 20 that you never met with anyone from LULAC, the League of United
21 Latin American Citizens; isn't that right?

22 A That's correct.

23 Q And you testified in *Chestnut* that you didn't even know
24 what that organization was?

09:53:15 25 A That's correct.

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1 Q And you further testified that you never paid attention to
2 what extent your black constituents supported or opposed you in
3 your congressional races; isn't that right?

4 A That's right. It didn't matter. I still had to represent
09:53:33 5 them, whether they voted for me or not.

6 Q Sure. But you didn't pay attention to whether they
7 actually supported or opposed you?

8 A No. Wouldn't matter.

9 Q So during your seven years in Congress, and I think you
09:53:47 10 already talked about this, you got to know the other members of
11 the Alabama delegation; isn't that right?

12 A Our delegation worked together very well, very closely.

13 Q And I -- in Ms. Welborn's cross-examination, you talked
14 about this a little bit, but I'd like to dig down a little
09:54:08 15 more.

16 MR. OSHER: Jeff, can I have you pull up Caster
17 Plaintiffs' Exhibit 12? Thanks.

18 BY MR. OSHER:

19 Q And, Representative, I will represent to you that this is
09:54:26 20 a map of the congressional plan that was in place I believe the
21 whole time that you were in office?

22 A That's correct.

23 Q Over a decade between 2012 and this year, or I should say
24 last year.

09:54:41 25 So Robert Aderholt represented District 4, right?

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1 A That's correct.

2 Q So looking at his district -- and let's see.

3 MR. OSHER: Jeff, could you focus in on the purple
4 district there? Yeah. Perfect.

09:54:59 5 BY MR. OSHER:

6 Q So looking at that district, it spans the width of the
7 state. It has corners in Colbert County in northwest down to
8 Lamar and Tuscaloosa counties, then over east to Etowah,
9 Marshall, and Dekalb County; isn't that right?

09:55:22 10 A Yes, sir.

11 Q Would you say that's an accurate description of that
12 description?

13 A Yes, sir.

14 Q Did Representative Aderholt ever express to you that it
09:55:32 15 was too difficult for him to travel to the different parts of
16 his district?

17 A No. I actually know that area fairly well because I have
18 campaigned in there twice running for statewide office, and
19 that area, it has an awful lot in common with one another.

09:55:49 20 Q Sure. That --

21 JUDGE MARCUS: Just let him finish his answer.

22 THE WITNESS: I said they're very similar.

23 BY MR. OSHER:

24 Q My apologies for -- I didn't mean to talk over you,
09:56:02 25 Representative.

1 That wasn't my question. My question was: Did
2 Representative Aderholt ever express to you that it was too
3 difficult for him to travel to the different parts of his
4 district when he represented them?

09:56:13 5 A No. When you are in Congress and you are delegated to a
6 district like that, you do what you have to do, and I am sure
7 he does an excellent job of it.

8 Q And he is an effective representative of his district?

9 A Yes. Very much so.

09:56:28 10 Q And you testified that you got to know Representative
11 Sewell pretty well during your time in Congress?

12 A Actually, I knew her before I got to Congress. But she
13 and I worked very closely together when I was in Congress.

14 Q She is also a very effective Representative of her
09:56:42 15 district?

16 A Very effective.

17 MR. OSHER: Jeff, can we focus on District 7 in the
18 map?

19 BY MR. OSHER:

09:56:53 20 Q So, again, looking at this district, her district started
21 out in -- well, it goes down to the south in Clarke County,
22 then to Montgomery in the east, up to Birmingham in the
23 northeast in Jefferson County, and then over to Pickens County
24 in the west. Do you see that? Did I describe her district
09:57:13 25 accurately?

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1 A Yes.

2 Q In your time in Congress, did Representative Sewell ever
3 express to that you it was too difficult for her to travel to
4 the different parts of her district?

09:57:26 5 A She never said it was too difficult, but she said it was
6 pretty difficult.

7 Q When did she say that?

8 A On several different occasions. She would talk about what
9 her schedule was and how difficult it was for her to be able to
09:57:39 10 go from Birmingham to Clarke County to Lowndes County to
11 Choctaw County, just the difficulty in travel, and the fact
12 that, you know, she's got parts of Jefferson County an urban
13 county, parts of Montgomery County another urban county
14 together with the rural Black Belt counties. It's tough, it's
09:58:01 15 real tough on her, but she is very smart and very capable, and
16 she does -- she works hard.

17 Q And you said she's a very effective representative?

18 A Oh, yes very effective.

19 Q And let's look at District 3.

09:58:17 20 As you spoke a bit about earlier, looking at that district
21 -- and I'm sorry. Who represents District 3?

22 A It's Mike Rogers.

23 Q And he did the whole time you were in office; is that
24 right?

09:58:29 25 A Oh, yes. Yeah.

1 Q So looking at his district, it has at least half of the
2 eastern border of the state running all the way up from
3 Cherokee County and all the way down to Russell County; isn't
4 that right?

09:58:41 5 A That's right.

6 Q Okay. Did Representative Rogers ever say to you that it
7 was too difficult for him to travel to the different parts of
8 his district?

9 A No. I think he felt like his district had a lot of
09:58:52 10 commonality -- not necessarily easy to get from Cherokee County
11 to Russell County, but the commonality of interests they had
12 made it a little bit easier on him.

13 He does have the Anniston Army Depot, so he is going to be
14 focused on that. But in Russell County, he has got people that
09:59:11 15 are across the river from a major Army base, so he's got that
16 to contend with, too. But he's a ranking member of the House
17 Armed Services Committee now, soon to be the chairman, and so
18 he will be in a unique position to help both of those.

19 Q Sure. That wasn't my question. My question was about the
09:59:29 20 difficulty of travel to the different parts of the district.

21 And --

22 A Yeah. He would say, I have had a long day or a long
23 couple of three days because I have to go from Cherokee County
24 all the way down to Pike Road in Montgomery. That's a long
09:59:44 25 way.

1 Q But he's -- you think he's a very effective representative
2 in his district?

3 A Oh, yeah, yeah.

4 Q Okay.

09:59:51 5 MR. OSHER: You can take that down, Jeff, thank you.

6 BY MR. OSHER:

7 Q In your direct examination, do you recall talking to
8 Mr. Davis about how the illustrative plans that the plaintiffs
9 have offered in this case may result in no congressional
10 representative living in Mobile? Do you remember that?

11 A Yes.

12 Q And I think -- I can't remember. It might have been
13 Mr. Davis or you said that that would be a tragedy?

14 A It would be a tragedy if we didn't have somebody from
15 Mobile representing the Mobile area, yeah.

16 Q Okay.

17 MR. OSHER: Jeff, could I have you pull up Defendants'
18 Exhibit 2, which I believe is Mr. Bryan's report that was
19 offered by the state in this case?

20 10:00:37 Can you go to page 27? Next page, please. And can you
21 zoom in on the Figure 5.6, Alabama enacted plan. Any way to
22 zoom in further.

23 BY MR. OSHER:

24 Q Representative, can you see that map?

25 10:01:08 A I can.

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1 Q Okay. I will represent to you that this is the current
2 enacted map, and it has dots as to where each of the current
3 Representatives live. Do you see that?

4 A I do.

10:01:19 5 Q Can you tell me which congressional representative
6 currently lives in Montgomery?

7 A I don't think anybody currently lives in Montgomery.

8 Q And you would agree that Montgomery is the third biggest
9 city in Alabama?

10:01:38 10 A Actually, now, I think it's the fourth.

11 Q Fair enough. You would say that Montgomery is a very
12 important city in the state of Alabama?

13 A Oh, yes, very important city.

14 Q Okay.

10:01:50 15 MR. OSHER: You can take that down, Jeff. Thank you.

16 BY MR. OSHER:

17 Q You spoke a bit about District 5 in the State Board of
18 Education plan. Do you remember that?

19 A I can't remember which district it was.

10:02:03 20 Q District 5 is the one that connects Montgomery to Mobile
21 with the Black Belt?

22 A Okay. I remember that one.

23 Q And up until a few years ago, Ella Bell represented that
24 district for a long time; is that right?

10:02:17 25 A She did, yes.

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1 Q Did she ever express to you that it was too difficult for
2 her to represent a district that had both Montgomery and Mobile
3 in it?

4 A Yes.

10:02:27 5 Q When did she say that?

6 A I think I mentioned earlier that I would get phone calls
7 from people in her district at -- thinking I was their state
8 school board member. And asking me to come to meetings. And I
9 would call her and I would say, it's your district, not my
10 district. I don't want to do anything in your district you
11 don't know about. I said, do you want me to do something? She
12 said, would you please, because I cannot get down there. It's
13 too far me to get from Montgomery to there. I have other
14 things going on. And so I said, sure, I will be happy to do
15 it. So I would do that for her from time to time and for her
16 predecessor.

17 Q And if she was a member of Congress and you were also a
18 member of Congress and that sort of confusion arose, that would
19 -- the same thing would happen, right, you would talk to the
20 other member of the Congress and try to figure it out?

21 A Yes. But I got to be honest with you, that never happened
22 when I was in Congress. I guess people know who their
23 Congressman is. So I never got any calls from Terri Sewell's
24 district, for example, saying would you come meet with us
25 except for Clarke County because she and I shared Clarke

1 County.

2 Q And Clarke County is the only district -- I'm sorry -- the
3 only county that your district split last redistricting cycle,
4 right?

10:03:43 5 A That's right. And we had an understanding we would work
6 together in Clarke County, and there was never any issue.

7 Q Sure. Ella Bell extremely effectively represented that
8 district, right?

9 A I don't think I would agree with that.

10:04:01 10 Q Dr. Tommy Stewart succeeded Ella Bell to represent that
11 district?

12 A I -- yeah. I don't know him, but I -- I know the name.

13 Q Did you ever speak to Dr. Stewart?

14 A Not that I can recall.

10:04:19 15 Q What about Dr. Chestnut, who currently represents that
16 district?

17 A I don't recall having any interaction with Dr. Chestnut
18 either. I've been away from the state school board for a
19 while.

20 Q You voted to -- in Ms. Welborn's cross-examination, you
21 spoke about your efforts to repeal the Affordable Care Act;
22 isn't that right?

23 A That's right.

24 Q You testified in *Chestnut* that you never tried to
10:04:48 25 determine whether your black constituents wanted the Affordable

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1 Care Act to be stay in place, right?

2 A I didn't try to determine anybody's particular views on
3 that. I just listened to what people were telling me. And I
4 had a lot of people telling me they wanted to change it.

10:05:02 5 Q You never sought out the advice from the state conference
6 of the NAACP on that issue?

7 A I think I testified earlier I never had any interaction
8 with them consciously. I may have been in a room with some of
9 them and didn't know they were members of that organization.

10:05:16 10 Q And you never even tried to figure out what their position
11 was on the issue?

12 A No. I -- when it came to that issue, I had plenty of
13 people tell me what their positions was. I didn't have to
14 reach out to people.

10:05:30 15 Q In *Chestnut*, you testified that while you were in office
16 you never even tried to determine how many black constituents
17 you actually had; isn't that right?

18 A Well, I knew them in general, but I didn't know precisely.
19 I knew it was about 25 percent.

10:05:44 20 Q In fact, when you were asked about a percentage of your
21 district that was black during *Chestnut*, you said, it didn't
22 matter to me. Isn't that right?

23 A It didn't matter to me.

24 Q You voted against the First Step Act?

10:05:59 25 A You have to refresh me. I don't know what the First Step

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1 Act was.

2 Q The First Step Act was the criminal justice reform?

3 A Oh, yeah, yeah, yeah. I'm sorry. Yes, I did.

4 Q But you testified in *Chestnut* that you never tried to
10:06:15 5 determine whether your black constituents felt that that bill
6 would improve their lives, right?

7 A I never heard from anybody about that bill.

8 Q You didn't attempt to discern the Alabama NAACP's view on
9 the bill?

10:06:30 10 A I never had any interaction with them. Consciously
11 knowingly.

12 Q You spoke a bit about the various factories and plants
13 that are located in Mobile?

14 A (Nodded head.)

10:06:44 15 Q Do you recall that?

16 A That's right.

17 Q Are you aware that there are higher rates of cancer and
18 asthma among the black community in Mobile due to their
19 proximity to those factories and plants?

20:06:55 20 A I'm not, but I wouldn't argue with it. In general, I know
21 that we have an issue with regard to the quality of health care
22 that's been available to black people in Alabama in my
23 district.

24 Q Do you know who Alabama commemorates in Congress' Statuary
10:07:19 25 Hall?

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1 A Yes. It's Helen Keller, and it's -- I forgot his name --
2 a former Civil War general.

3 Q Joseph Wheeler?

4 A Yeah.

10:07:31 5 Q And Joseph Wheeler was a cavalry general for the
6 Confederate Army; isn't that right?

7 A I know he was a general. I don't know if it was cavalry
8 or not.

9 Q But he was on the Confederate side of the Civil War?

10:07:43 10 A Right. I know a lot more about Helen Keller than I know
11 about him.

12 Q Did you ever try to determine how your black constituents
13 felt about Alabama celebrating a Confederate general in the
14 halls of Congress?

10:07:53 15 A I never asked them, but I think I can guess.

16 Q You never reached out to?

17 A No.

18 Q And what is your guess as to how they would feel about it?

19 A I don't think they would like it. That's a decision by
10:08:08 20 the state, not a decision by Congress.

21 Q You would agree with me that members of Congress can use
22 their influence to try to change state policy?

23 A Some do. I didn't. I didn't think it was appropriate.
24 Now, when I was in the Legislature, I supported putting Helen
10:08:29 25 Keller's statute in there. I actually served on the committee

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1 that raised the money to put the statue there because I think
2 Helen Keller was a better representative of the state than the
3 person we had there before.

4 Q Oh, you're referring to the Joseph Wheeler statue, or the
10:08:44 5 one that was replaced by Helen Keller?

6 A The one replaced by Helen Keller.

7 Q You didn't take any action in the Legislature to remove
8 the Joseph Wheeler statue or replace it with something else?

9 A No. We were kind of focused on Helen Keller when I was in
10:08:57 10 the Legislature.

11 Q Speaking of your time in the Legislature, when did you
12 serve in the Senate?

13 A From November of 2002 to May of 2007.

14 Q During that time, I imagine you went to the Alabama
10:09:15 15 Capitol pretty often?

16 A Yes, sir.

17 Q Did you often walk by the monument to Confederate soldiers
18 and sailors that sits in front of the Capitol?

19 A If I did, I didn't pay any attention to it. I didn't know
10:09:30 20 that we had one.

21 Q So you sort of turned a blind eye to it?

22 A I was busy doing other things. I wasn't paying attention
23 to stuff like that.

24 Q Were you aware that while you were there, the memorial was
10:09:40 25 surrounded by flags of the Confederate states?

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1 A I don't remember that, either.

2 Q Is it your contention that that shrine to the Confederacy
3 does not exist in front of the Capitol?

4 A Oh, no. I'm not saying they don't. I just never paid any
10:09:58 5 attention to them.

6 Q So you never tried to determine whether your black
7 constituents had a problem with that sitting at the foot of the
8 Capitol?

9 A I never had a discussion with any constituent about that.

10 Q And is your assumption that you described earlier the same
11 here that you would think that your black constituents probably
12 did not appreciate that?

13 A If they even knew about it.

14 Q Representative, you would agree that the poverty rate
10:10:32 15 among black Alabamians is significantly higher than it is among
16 white Alabamians?

17 A I know it's higher. I don't know I can say it's
18 significantly higher.

19 Q Am I right that when you testified in *Chestnut*, you
10:10:44 20 actually said you didn't know if that was the case, right?

21 A No. But I wouldn't be surprised if it was higher.

22 Q Understood. I will represent to you that the poverty rate
23 is more than double among black Alabamians than it is white
24 Alabamians.

10:11:06 25 What about child poverty rates? Do you know if there's a

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1 disparity there?

2 A I don't. I don't know what the child poverty rate is.

3 Q Would it surprise you if it was nearly triple among black
4 Alabamians than it is white Alabamians?

10:11:19 5 A It would not.

6 Q Household average income, do you know if that's lower
7 among black Alabamians than white Alabamians?

8 A I don't know, but I would not be surprised if it were.

9 Q Same with unemployment rate, do you know if it's -- if
10 it's higher than among black Alabamians than white Alabamians?

11 A I don't know, but I wouldn't be surprised if it were.

12 Q I will represent to you that it's more than double among
13 black Alabamians than white Alabamians. Does that surprise
14 you?

10:11:48 15 A Yeah, that kind of does surprise me.

16 Q Okay. Do you have any reason to dispute that?

17 A No. I am just saying -- I don't have the data in front of
18 me, so I am not going to try to guess at the data, but as I
19 come around and looked at this as an industry down in this part
20 of the state, there are plenty of black people that work in
21 every industry that we have got down here. And that doesn't
22 surprise me because 25 percent of the people that live down
23 here are black and expected to be in the work force, and they
24 are.

25 Q Representative you are a little quiet now, if you wouldn't

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1 mind speaking up.

2 A Okay.

3 Q Thank you.

4 A I will move a little closer.

10:12:30 5 Q I will represent to you that one of the Caster plaintiffs' experts in this case reported that the black unemployment rate among -- the black Alabamian unemployment rate is 7.8 percent, and that for white Alabamians, it's 3.8 percent. So the -- so he reports that it's more than double among black Alabamians?

10:12:51 10 A I don't know.

11 Q So assuming the figures that I discussed there are true, you would agree that those disparities stem from Alabama's centuries' long discrimination against black people in the state?

10:13:04 15 A I think the problems that are facing the black community with regard to all these issues is a function of the failure of the state of Alabama to provide a quality education to them.

18 Q Does that have -- is that rooted in the discrimination that Alabama had against black individuals?

10:13:23 20 A No. It's rooted in the overall failure to the Alabama public education system, which -- white people just not as much as it affects black people. It's the reason I got in public to begin with is because I thought the biggest problem facing Alabama was our inability to provide quality education to all of our citizens, and we're still not doing enough. And it's

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1 having these effects that I think hurt everybody in Alabama,
2 but particularly the people who are not getting that quality
3 education.

4 Q So is it your testimony that the disparities that I have
10:13:56 5 described have no roots in the centuries' long discrimination
6 that Alabama, the entrenched discrimination in Alabama against
7 black individuals?

8 A I don't know that I can say that there's no effect. But
9 what I'm saying is, is that the single biggest problem, the
10:14:15 10 thing that's the biggest cause for them is our failure to
11 provide quality education to everybody in the state. We live
12 in a time when you're going to be valued by what you know and
13 what you do with what you know. And if we don't provide
14 quality education to all of our people, they won't get the
10:14:32 15 economic value in their lives that they need. If they don't
16 have the economic value in their lives, they can't afford
17 quality health care and all these other stuff. So I continue
18 to believe today as I did when I ran for state school board in
19 1994, if you want to address all the other issues, fix the
10:14:48 20 education system in the state.

21 Q You agree with me that Alabama had for a very long time a
22 strictly segregated education system?

23 A Oh, yes, sir, absolutely. To our great shame, we did
24 that.

10:15:03 25 Q Just a few more questions, Representative.

1 You testified on direct about the -- the campaign ad. Do
2 you recall that?

3 A Yes.

4 Q Your campaign ad.

10:15:17 5 I understand your testimony that that ad was intended to
6 be primarily about your brother; is that right?

7 A That's correct.

8 Q So regardless of your intent, do you know how that ad was
9 perceived among your black constituents?

10:15:29 10 A I don't know that I ever had a discussion with a black
11 person about that ad.

12 Q You didn't hear any feedback from the black community or
13 the press on this?

14 A Not that I can recall.

10:15:44 15 Q You understand, don't you, that images of black people in
16 a fire could trigger a connection in the minds of some to the
17 more horrific eras of racial discrimination in Alabama?

18 A No.

19 Q You would agree that in Alabama, there is a horrific
10:16:03 20 history of lynching black Americans?

21 A Yes, sir.

22 Q And that history included burning black individuals alive?

23 A Never heard of that.

24 Q You would also agree, wouldn't you, that Alabama has had a
10:16:17 25 history of bombing and burning down houses occupied by black

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1 Alabamians?

2 A Yes, sir. To our great shame.

3 Q You would also agree that the KKK used burning crosses to
4 terrorize black individuals in Alabama?

10:16:31 5 A Yes, sir. To our great shame, they did that.

6 MR. OSHER: Your Honor, if I can just have a minute.

7 JUDGE MARCUS: You may.

8 BY MR. OSHER:

9 Q Just one more question, Representative. Sitting here
10:17:11 10 today, do you understand how the images included in that ad
11 might be viewed negatively by the black community?

12 A No.

13 MR. OSHER: That's all I have. Thank you.

14 JUDGE MARCUS: All right. Thank you. And who will be
10:17:25 15 conducting cross-examination for the Singleton plaintiffs?

16 MR. WHATLEY: Your Honor, I am Joe Whatley. I will.

17 JUDGE MARCUS: All right. Thank you, Mr. Whatley, and
18 you may proceed.

19 MR. WHATLEY: Thank you.

10:17:35 20 CROSS-EXAMINATION

21 BY MR. WHATLEY:

22 Q Mr. Byrne, it's good to see you again. I have a few
23 questions.

24 First of all, I, along with other counsel, I represent the
10:17:47 25 Singleton plaintiffs. Are you familiar with the whole county

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1 plan that the Singleton plaintiffs have proposed, Singleton
2 plan number one?

3 A I don't know if it's the Singleton plan, but I have seen a
4 map that shows whole counties.

10:18:03 5 Q Okay. And are you aware that that plan keeps Mobile
6 County whole?

7 A The map that I saw kept Mobile County whole.

8 Q And you would agree that's a good thing?

9 A That's a good thing. What I was concerned about was that
10:18:23 10 it added Andalusia and the county that Andalusia is in and took
11 away Washington County and Monroe County. I don't think that's
12 a community of interest between Covington County which is where
13 Andalusia is and Mobile.

14 Q Okay. We will talk about that in a second.

10:18:35 15 A Okay.

16 Q But it also kept Mobile and Baldwin counties together, the
17 two Gulf counties?

18 A It did.

19 Q And that was something you viewed to be crucial, correct?

10:18:43 20 A Yes.

21 Q Okay. And you know when you are drawing districts you
22 have to keep the population -- you have to have an eye on the
23 population. What you have -- how equal it has to be is a
24 question the judges will decide. But you know that you have to
10:18:58 25 look to population of counties when you are drawing districts,

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1 correct?

2 A That's correct.

3 Q And by putting Covington in instead of Washington and
4 Monroe, they came -- the Singleton plaintiffs came to districts
10:19:14 5 that had relatively equal population, correct?

6 A That's correct. It has some flaws other than that, but,
7 yes, it does do that.

8 Q And you would also agree that Covington and Escambia
9 counties have some commonalities, correct?

10:19:29 10 A Yes. But Escambia County is not the core of the district.

11 Q I'm sorry. I couldn't hear you?

12 A I'm sorry. Escambia County is not the core of the
13 district. And the part of Escambia County that is closest to
14 Covington County, which is Brewton and east Brewton, not really
10:19:48 15 Atmore, which on the other end of Escambia County, clearly much
16 more to Mobile.

17 Q And the county seat in Escambia County?

18 A Brewton.

19 Q Remind me where that is?

10:19:58 20 A It's Brewton.

21 Q Okay. In that eastern end of the county that's closer to
22 Covington?

23 A That's right.

24 Q And not far from Andalusia?

10:20:04 25 A That's right.

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1 Q Okay.

2 MR. WHATLEY: Let's pull up Caster Exhibit 12. And go
3 down so we can see the southern part of that, Suzanne.

4 BY MR. WHATLEY:

10:20:26 5 Q This is the current district -- I think you just testified
6 the district that -- District 1 is the one you served in this
7 configuration?

8 A That's correct.

9 Q Okay. Now, I will tell you as a preliminary matter both,
10 Mr. Hare and I grew up in Monroeville. And my mother and his
11 parents still live in Monroeville. So let's spend a little bit
12 of time talking about your testimony about Monroe County.

13 Now, Monroe County -- in Monroe County, the economy is
14 largely or in many respects built around the tree; isn't that
15 right? You have paper mills, you have the timber business
16 especially in the northern part of the county. It's -- that's
17 a huge part of the county -- economy; isn't that right?

18 A It's a significant part of it, yes.

19 Q Okay. And they don't have ship building in Monroe County,
20 for example?

21 A No. But you have people from Monroe County that work in
22 the shipyards.

23 Q True. People commute. But they don't do it in Monroe
24 County?

25 A They don't do it in Monroe County, no.

1 Q And, in fact, between 2010 and 2020, between the two
2 censuses, Monroe County lost a significant part of its
3 population, didn't it, what, around 15 percent?

4 A I don't know the exact percent, but they did lose a
10:21:52 5 significant amount of population.

6 Q Okay. And in Monroe County or at least Monroeville also
7 has a tourist element to its economy, doesn't it?

8 A It does. They try to attract people there because it's
9 the home of Harper Lee, who you probably knew.

10:22:10 Q Right. And you brought up Truman Capote in your direct
11 testimony. Were you aware that Truman was the other boy, To
12 Kill a Mockingbird?

13 A Yes.

14 Q Not Harper Lee's brother obviously, but the other boy in
10:22:30 15 To Kill a Mockingbird?

16 A Yes.

17 Q And what you're saying -- in Monroeville, especially
18 pre-COVID and we hope post-COVID, a lot of the economy is built
19 around the Mockingbird, it's built around Harper Lee and Truman
10:22:48 20 Capote and attracting tourists to Monroeville based on that?

21 A They're trying to develop more tourism off of that, yes.
22 I don't know to what extent they have been successful.

23 Q Well, you know at least pre-COVID and even last year to
24 some extent they have a -- the To Kill a Mockingbird play and
10:23:05 25 attract hundreds -- attract thousands of people into

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1 Monroeville to see the Mockingbird play?

2 A Yes, they do. In fact, I've seen it three or four times
3 and got to be on the jury one time.

4 Q Okay. And that -- especially in the spring is a big part
10:23:22 5 of the economy?

6 A In the spring, I would think it would be, yeah.

7 Q Okay. And you mentioned that you attended a town hall
8 meeting in Beatrice, right?

9 A Yeah. Yeah.

10:23:37 10 MR. WHATLEY: And, Suzanne, can you make the District
11 1 larger?

12 BY MR. WHATLEY:

13 Q Is kind of in the northeastern corner of Monroe County?

14 A I don't know -- yeah, I guess that's northeastern.

10:24:03 15 Q And one of the things that's important in Beatrice's
16 economy is hunting camps. You mentioned you were at you a
17 hunting camp, at your hunting camp, but hunting camps are big
18 up there, right?

19 A Yes.

10:24:19 20 Q Okay. And I think you said the northern part of Monroe
21 County is a predominately black area, right?

22 A Yes.

23 Q And, in fact, especially the northern half of Monroe
24 County is considered to be part of the Black Belt, right?

10:24:32 25 A I don't know that.

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1 Q You don't know that.

2 Do you know that both its population and its economy have
3 a lot of similarities to the rest of the Black Belt, correct?

4 A I don't think I would agree with that. It has some
10:24:52 5 interesting unique industries there. You mentioned tourism, in
6 terms of the Mockingbird, but also there's a plant there that
7 does pre-manufactured concrete walls. It's another plant there
8 that makes the cardboard containers that are used to package
9 various goods including some of the craft beer that are made in
10:25:21 10 Mobile. So I don't know other counties in the Black Belt that
11 have those sort of more advanced industries.

12 Q Yes, sir. I'm sorry. Did I cut you off?

13 A No. I finished.

14 Q Okay. You were talking about the precast concrete. You
10:25:40 15 were talking about Gate or Gate-Lazenby?

16 A Yes.

17 Q Okay. What I was really focused on is more the part of
18 the county north of Monroeville?

19 A Okay.

20 Q And Gate-Lazenby -- I don't mean to make this personal,
21 but I worked my way through college working there. But north
22 of Gate-Lazenby is also south of Monroeville, right?

23 A Yes.

24 Q Okay. And north of --

25 A But in Monroe County.

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1 Q North of Monrovia, in the northern part of the county,
2 that is the area where wouldn't you agree with me at least the
3 population is very similar to what you found in the Black Belt?

4 A I would think in very north Monroe County, it would be
10:26:21 5 very similar to say Wilcox County.

6 Q Right. And you talked about the education. The high
7 school in Beatrice is J. F. Shields, right?

8 A I don't know the name of it.

9 Q But you know there is a high school in --

10 A That's right. I think I have been there.

11 Q Yes, sir. And it is an all-black school?

12 A I know it's predominantly black. I don't know if it's all
13 black.

14 Q And the white children around Beatrice go to the all-white
10:27:03 15 private school, Monroe Academy down in Monroeville, don't they?

16 A I don't know that.

17 Q You don't know that?

18 A No.

19 Q Well, you mentioned that there were some white folks at
10:27:13 20 your town hall meeting in Beatrice. Do you know where their
21 children go to school?

22 A I didn't ask where they children went to school. People
23 in the town hall meeting were mainly older.

24 Q Okay. You do know that there is an all-white private
10:27:29 25 academy in Monroe County where many of the white students go to

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1 school?

2 A I know that there's a private academy. I don't know the
3 racial mix of it. I don't think I have ever been to that
4 school.

10:27:41 5 Q Okay. Now, let's go over to Clarke County, if we could.

6 You represented -- and, again, I have relatives there, so
7 I am going to focus on some issues. You are represented the
8 part of Clarke County that includes Grove Hill?

9 A Part of Grove Little, not all of Grove Hill.

10:28:06 10 Q And you represented the part that goes out on Highway 84,
11 the road that goes sort of east and west to there, that's
12 Highway 84, right?

13 A Yeah.

14 Q And are you aware that there's a town of Whatley about
10:28:23 15 six miles east of Grove Hill?

16 A I am aware of it.

17 Q On Highway 84?

18 A Yes.

19 Q Okay. And so as an example, my cousins in Grove Hill or
10:28:42 20 north of Highway 84 in Grove Hill would have been represented
21 by you, right?

22 A Depending upon exactly where they live, probably so. But
23 if they were northeast, they wouldn't be represented by me.

24 Q And if they were northwest, they would be?

10:28:57 25 A They would be.

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1 Q Okay. And my cousins in Whatley, Alabama, six miles to
2 the east in the same county, would have been represented by
3 Congresswoman Sewell?

4 A I think that's right, yes.

10:29:09 5 Q Okay. And I want to be clear. This question is not meant
6 to disparage either you or Congresswoman Sewell. You would
7 agree, I think you already have, that she is an outstanding
8 congresswoman?

9 A She is an outstanding congresswoman.

10:29:26 10 Q But wouldn't you agree, sir, and I think this has been
11 your testimony, that if you had combined Clarke County, that my
12 cousins in Whatley and my cousins in Grove Hill would have been
13 better represented regardless of whether it was you or her?

14 A By having just one congressman?

10:29:52 15 Q Yes?

16 A Yeah. I think that's what I have been saying in previous
17 testimony. I think it's better for a county to have one
18 congressman and not to be split up. But what Congresswoman
19 Sewell and I did was from the very beginning we said we will
10:30:05 20 work together, and we did. We worked together very well. We
21 used to do joint town halls together for example. Thomasville
22 was not in my district, but the mayor of Thomasville would come
23 and see me every time he was in Washington. He is a personal
24 friend, and if Congresswoman Sewell needed help from
10:30:22 25 Thomasville, she got it from me 100 years ago percent of the

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1 time. That's just the way we worked things out.

2 Q But despite that fact, your testimony is that it would be
3 better off to keep counties together?

4 A Yes. That's my position.

10:30:34 5 Q And you believe that it would be better to keep Tuscaloosa
6 so it's not split, for example?

7 A Yes.

8 Q And the same for other counties in Alabama that are split,
9 such as Montgomery?

10:30:46 10 A Yes. Now, I understand that when you're trying to balance
11 out population, sometimes you can't make that happen. But to
12 the maximum extent possible, counties should be kept whole and
13 contiguous in congressional districts.

14 Q And you were asked specifically about the -- about
15 Montgomery not having a Congress person. Do you recall that?

16 A I don't remember the question just put that way, no.

17 Q In any event, Montgomery currently does not have a member
18 of Congress living there, correct?

19 A No one that lives there, yes, that's correct.

10:31:26 20 Q Yes. I'm sorry. I wasn't clear with my question.

21 A They had Martha Roby previously, and now their present
22 member is from Coffee County.

23 Q And was it your testimony that by splitting or splitting
24 any county you might make it less likely that a congressperson
10:31:44 25 reside there?

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1 A Yeah.

2 Q Okay.

3 A You start splitting counties like that, and that county
4 loses its influence. That's why I don't want Mobile County to
10:31:55 5 be split.

6 Q And --

7 MR. DAVIS: Give me one second. Sorry to interrupt,
8 Mr. Whatley. Judge, I just want to check on Mr. Byrne. We
9 have been going about two hours.

10:32:05 10 JUDGE MARCUS: We have been going a long time.

11 Let me ask you, Mr. Whatley: How much longer you have
12 with Mr. Byrne. Perhaps this would be a convenient time for a
13 short break.

14 MR. WHATLEY: It's fine for me to take a short break,
10:32:20 15 Your Honor.

16 JUDGE MARCUS: All right. We will take a break for
17 15 minutes, and then we will pick up the balance of your
18 examination.

19 Question, though, Mr. Whatley: How much longer do you
10:32:32 20 think you have with Mr. Byrne?

21 MR. WHATLEY: I would guess about 10 or 15 minutes.
22 Perhaps the break will make it shorter.

23 JUDGE MARCUS: I'm sorry. I didn't mean to cut you
24 off.

10:32:41 25 MR. WHATLEY: I said perhaps the break will make it

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1 shorter and more organized.

2 JUDGE MARCUS: All right. We will break for
3 15 minutes and then pick up the thread of the cross by
4 Mr. Whatley and any redirect by Mr. Davis.

10:32:53 5 Thank you. We will in a 15-minute recess.

6 (Recess.)

7 JUDGE MARCUS: Mr. Whatley, are you ready to proceed
8 at this point?

9 MR. WHATLEY: Yes, sir.

10:48:40 10 JUDGE MARCUS: Mr. Byrne, you all set to go forward?

11 THE WITNESS: Yes, sir, I am.

12 JUDGE MARCUS: Thank you very much. Mr. Whatley, you
13 may complete your cross.

14 MR. WHATLEY: Thank you, Your Honor.

10:48:51 15 Suzanne, will you put back up for just a minute the 2011
16 plan? I think it's Caster Exhibit 12, Your Honor.

17 JUDGE MARCUS: Just so I'm clear, Mr. Whatley, this is
18 the plan that actually was enacted by the state Legislature in
19 2011, correct?

10:49:23 20 MR. WHATLEY: Yes, sir. Yes, sir, Your Honor. And
21 just to put it in context, Mr. Byrne, it's the plan that
22 existed when you served in Congress, correct?

23 THE WITNESS: Yes, sir.

24 BY MR. WHATLEY:

10:49:34 25 Q Okay. I want to focus back on Clarke County for just one

1 second.

2 And I don't think I asked you about the economy of Clarke
3 County. In Clarke County, a big part of the county also
4 focuses on the tree, correct?

10:49:52 5 A Yes.

6 Q And so a paper mill and lumber mill in Jackson?

7 A Yes.

8 Q In the southern part of the county, correct?

9 A That's correct.

10 Q And there is a paper mill -- I don't know if you can see
11 it -- it's in the edge of Wilcox County and Pine Hill, not far
12 from Thomasville that you mentioned, correct?

13 A Yes. Yes.

14 Q And so they make paper, and they produce lumber in Clarke
15 County, and they don't make ships, correct?

16 A They don't make ships in Clarke County.

17 Q But they do make paper, and they do produce timber?

18 A That's correct.

19 Q Okay. We can take that down.

20 Mr. Byrne, I think in your -- you have clearly said before
21 -- I don't remember if it was in your testimony in the previous
22 case, or in your deposition, that you think it's important that
23 each of the urban or Metropolitan -- or each of the cities in
24 Alabama have its own congressional district or be in a separate
25 congressional district?

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1 A Yes. I think that the four metro areas in the state, plus
2 Dothan, Tuscaloosa, Auburn, all those areas need to have sort
3 of at the center of their community adequately represented in
4 the United States Congress.

10:51:26 5 Q So there ought to be in separate -- and to be clear, there
6 ought to be separate congressional districts or Huntsville,
7 Mobile, Montgomery, and Birmingham should each be located in a
8 separate congressional district from each other?

9 A Yes.

10:51:45 10 Q Okay. And going to Congressman Palmer, I think there was
11 some questioning about Congressman Palmer earlier maybe by both
12 counsel. Isn't it correct that Congressman Palmer currently
13 lives in Shelby County?

14 A To be honest with you, I don't know exactly where he
10:52:06 15 lives. He either lives in the southern part of Jefferson
16 County or in Shelby County. I don't know.

17 Q Were you aware that at one point he did live in Jefferson
18 County and he moved to Shelby County?

19 A I am not aware of that.

10:52:18 20 Q You are not aware of that. Okay.

21 MR. WHATLEY: Your Honors, I think that's all I have.

22 JUDGE MARCUS: Thank you. Redirect, Mr. Davis?

23 MR. DAVIS: Yes, Your Honor, briefly.

24 REDIRECT EXAMINATION

10:52:30 25 BY MR. DAVIS:

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1 Q Mr. Byrne, did you turn down any meeting requests from the
2 Alabama NAACP?

3 A No.

4 Q Would you have been happy to meet with them had they asked
10:52:38 5 for a meeting?

6 A Absolutely. I meet with just about everybody.

7 Q We talked about the third districts -- and the Third
8 District and the Fourth Congressional District when you were
9 speaking with Mr. Osher. Do you consider the areas encompassed
10:52:54 10 in Alabama's Third Congressional District to be part of a
11 community of interest?

12 A I do. That's east Alabama, and it got a common set of
13 industries and things that they're interested in, and they
14 largely look to Auburn as their university.

10:53:09 15 Q What about the Fourth Congressional District, do you
16 consider those areas to be part of a community of interest?

17 A They are. We have similar industry in all those areas all
18 tied to the automobile industry, for example. And they have
19 very similar -- when you go from one of those towns to the
10:53:27 20 next, walking from the east side of the state to the west, the
21 towns are very similar to one another.

22 Q Do you consider the more urban parts of Mobile County to
23 be part of the same community of interest with Montgomery,
24 Macon, and Barbour counties?

10:53:47 25 A I have been up and down those other places. They just

1 don't have a connection to Mobile or so.

2 Q And what about the more rural parts of Mobile County? Are
3 they part of a community of interest with the Wiregrass in
4 Dothan?

10:54:02 5 A No, they are not.

6 Q When you are considering --

7 A Let me give an example there. One of the maps I saw of
8 Covington County in the First Congressional District, there's
9 really no connection between Covington County and the main
10 interest that you can see in the First Congressional District.

11 So I don't see that it makes any sense to put a Wiregrass
12 county like Covington in with a district that's primarily
13 centered with Mobile and Baldwin County. It's hard to get to
14 Andalusia from Mobile, very hard. And so as the result, very
15 few people go back and forth between Andalusia and Mobile.

16 Q Which districts would allow a Congressman or congresswoman
17 to more effectively represent the constituents of District 1,
18 whether they're black, whether they're white, Republican,
19 Democrat, rich or poor? Would that be the districts as passed
20 in Alabama's plan, or the districts that plaintiffs are
21 proposing that we viewed a little while ago?

22 A The Legislature plan by far. And as I said before, I
23 testified before that committee, and I listened to other people
24 talk while I was there. And the Legislature effectively did
25 what we were asked to do, which was to keep our part of the

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1 state together.

2 Q Uh-huh. And would your ability as a Congressman to
3 represent your constituents, would it be negatively impacted if
4 your district changed at the last minute to a vastly different
10:55:34 5 structure, including different areas of the state?

6 A Very definitely so, yes.

7 Q We talked about a lot issues, Mr. Byrne. Is there
8 anything else you would like to bring to the Court's attention
9 as they consider these various plans?

10:55:47 10 A Yes, sir. I would want to say this. I have great respect
11 for the Court and this proceeding, and I know the Court's got
12 some difficult decisions to make. But we're pretty far along
13 into this campaign cycle. And I have seen what it does to
14 congressmen in other states when at the last minute, courts
10:56:05 15 start moving things around. And I think it hurts the
16 effectiveness of congressmen when that happens. I am not
17 saying the Court may not have a good reason to do it.

18 But as I said earlier, we are just a few months away from
19 primaries. And it would be very difficult to start shifting
10:56:22 20 this thing around. It was hard enough as it was when the
21 Legislature pass these districts. People held back and held
22 back and held back. And now, they're right in the meat of
23 these campaigns. And I just think it would be terrible if we
24 change course on all these candidates running for these various
10:56:40 25 offices, Democrat, Republican, doesn't matter. It's going to

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1 have the very same detrimental effect on those candidates and
2 on those congressmen, sitting congressmen if all of a sudden
3 these things are moved around some more.

4 And the second thing I would say is, I've tried to say a
10:56:55 5 little bit earlier, Covington County doesn't fit with the First
6 Congressional District. They're wonderful people over there.
7 I have good friends. I worked with a lot of them when we were
8 replacing the president of the community college. But I don't
9 think they would want to be in a district with Mobile because
10:57:09 10 they look to Dothan. They look to the Wiregrass.

11 So that map that has Covington County with Mobile, that
12 just doesn't fit. And I think the way the Legislature has
13 drawn the First Congressional District makes all the sense in
14 the world, given the needs that they have to try to take a few
10:57:26 15 areas away from that district presently because of the growth
16 in Baldwin County. I think they did the best they could
17 possibly do.

18 MR. DAVIS: Thank you, Your Honor.

19 MS. WELBORN: I'm sorry. We just objected to that
10:57:38 20 last line of questioning and move to strike it as beyond the
21 scope of Mr. Byrne's direct. Asking, you know, anything else
22 he wanted to add was not in Mr. Byrne's direct examination.

23 JUDGE MARCUS: It would have been wiser to object
24 before the question was asked, but while the question I think
10:57:58 25 did go beyond, the answer, I think bore upon the stuff that

1 came up in cross. So the objection is overruled, and we will
2 not strike that portion of the testimony. But thank you.

3 Any other questions, Mr. Davis, that you have for
4 Mr. Byrne?

10:58:13 5 MR. DAVIS: No, Your Honor. That completes redirect.

6 JUDGE MARCUS: Any other questions any of the lawyers
7 have for Mr. Byrne?

8 All right. Judge Moorer, Judge Manasco, did either of you
9 have a question for Mr. Byrne?

10:58:30 10 JUDGE MANASCO: None from me.

11 JUDGE MOORER: No, sir.

12 JUDGE MARCUS: Mr. Byrne, I have got a question for
13 you. Perhaps you can help me with this.

14 On your direct examination by Mr. Davis, you were asked
10:58:47 15 about the 2021 map that the Legislature adopted for the State
16 Board of Education.

17 THE WITNESS: Right.

18 JUDGE MARCUS: And it was observed that -- you
19 observed that you testified, if I heard you right, with regard
10:59:06 20 to that and urged the Legislature not to split Mobile County.
21 Did I have that right?

22 THE WITNESS: Yes, sir, that's what I said.

23 JUDGE MARCUS: And then the testimony came out that,
24 in fact, the Legislature in 2021 split Mobile County in the
10:59:29 25 maps that it drew for the board of education, and it

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1 specifically split Mobile County between Districts 1 and 5.
2 This is the board of ed map I am talking about. Do you recall
3 all of that discussion?

4 THE WITNESS: Yes, sir, I do.

10:59:47 5 JUDGE MARCUS: I just have one question, if you know
6 the answer. I was curious, do you know why the Legislature
7 actually split Mobile County between Districts 1 and 5 when
8 they drew the board of education maps?

9 THE WITNESS: Yes, sir. They actually did this in
11:00:09 10 2011. The other district -- District 1 is the one down here.
11 District 5 I guess is the other one. That district lost a lot
12 of population, and they had to pick it up somewhere. And they
13 believed that the best way to pick it up was to go south into
14 Mobile County.

11:00:25 15 So while I was sympathetic to the fact the Legislature had
16 to make some significant changes to that district, I didn't
17 like the fact that they were splitting Mobile County because of
18 the fact the Mobile County school system is so big and has so
19 many issues as any big school systems does.

11:00:41 20 I would like to see a school board member that's focused
21 on that primarily as their job.

22 JUDGE MARCUS: Thank you much.

23 Any follow-up questions from any of the lawyers based on
24 the question that I had asked Mr. Byrne? Mr. Davis?

11:00:55 25 MR. DAVIS: No, Your Honor.

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1 JUDGE MARCUS: Mr. Whatley?

2 MR. WHATLEY: No, Your Honor.

3 JUDGE MARCUS: Mr. Osher? Counsel for --

4 MS. WELBORN: No, Your Honor.

11:01:03 5 JUDGE MARCUS: -- for Milligan?

6 All right. We thank you very much for your time and
7 efforts this morning, Mr. Byrne, and you are excused.

8 THE WITNESS: Thank you, Your Honor.

9 JUDGE MARCUS: Does that close the presentation of
11:01:20 10 evidence for the state?

11 MR. DAVIS: It does, Your Honor.

12 JUDGE MARCUS: And that would be for both the
13 Secretary of State as the party defendant and for the
14 intervening defendants McClendon and Pringle, correct?

11:01:38 15 MR. DAVIS: That's right, Judge.

16 JUDGE MARCUS: Okay. Did -- before we get to
17 exhibits, which I wanted to talk about before we went on to
18 closing arguments, was there anything by way of rebuttal either
19 from the Milligan plaintiffs, the Caster plaintiffs, or the
11:01:55 20 Singleton plaintiffs?

21 MR. BLACKSHER: Singleton plaintiffs, no, Your Honor.

22 JUDGE MARCUS: Thank you. Milligan?

23 MR. ROSS: No, Your Honor.

24 JUDGE MARCUS: And for Caster, Ms. Khanna?

11:02:09 25 MS. KHANNA: No, Your Honor.

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1 JUDGE MARCUS: Okay. So, then, we can turn to the
2 question of the objections on some of the exhibits. I think
3 that was one open piece of business that you flagged late
4 yesterday for us, Mr. Davis, and I think it is -- there are
11:02:29 5 some open questions. I wanted to give you all a chance to
6 address the exhibits to which you are objecting. We will
7 generally take it under advisement, and the three judges will
8 have a chance to discuss it, and we will give you our answer or
9 answers in any written opinion or opinions that we may present.

11:02:53 10 But let's talk first about the -- I guess the exhibits
11 with regard to Milligan. There was an objection to -- we
12 received M-1 to 46, 48, 49, 50. There was an objection to 47,
13 if I recall that right. Mr. Ross, that was a transcript of the
14 Alabama Senate floor debate on November the 3rd, 2021. And I
11:03:35 15 think the objection was simply based on authenticity. Do I
16 have that right, Mr. Ross?

17 MR. ROSS: Yes, Your Honor. We were waiting to hear
18 back from Mr. Davis. He was supposed to, I guess, listen to
19 the recording and review the transcript.

11:03:52 20 JUDGE MARCUS: Gotcha. Mr. Davis, where are we on
21 M-47?

22 MR. DAVIS: Judge, I haven't had a chance to listen to
23 the recordings, but I think the cat's out of the bag on this
24 one, anyway. I think this same transcript is in the record
11:04:06 25 elsewhere as an exhibit to a deposition. So for purposes of

1 the preliminary injunction, we will withdraw the objection.

2 JUDGE MARCUS: Okay. So we -- so the record is clear,
3 Mr. Ross, we will receive M-47, that transcript.

4 I think that was the only objection there were to your
11:04:25 5 exhibits. Have I got that right, or did I miss something?

6 MR. ROSS: That's right, Your Honor.

7 JUDGE MARCUS: Okay. Let's turn to the Singleton
8 exhibits, if we could.

9 Mr. Quillen, I take it you will be commenting on those as
11:04:41 10 we go along.

11 MR. QUILLEN: Yes.

12 JUDGE MARCUS: Okay. Help me with this. As I recall
13 this, and I reviewed our original discussion at the beginning
14 of the trial, Singleton 1 to 31 was received. 35 to 41 was
11:04:57 15 received. 44 and 45 were received. There was no objection to
16 46 to 50 and 53 to 59. Although some of those overlapped with
17 exhibits that the defendants had already put in. Do I have
18 that right?

19 MR. QUILLEN: That's right.

20 JUDGE MARCUS: Okay. So the first objection or
21 objections that I saw that were interposed were the Singleton's
22 32, 33, and 34. And that concerned some mapping software that
23 was used that was the DRA acronym if my recollection has that
24 correct. And that was data drawn from the DRA created to use
11:05:47 25 the maps and the software. There were objections to relevance

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1 and authenticity. I think they really -- the arguments were
2 the same on 32, 33, and 34.

3 Did you want to address those three exhibits, Mr. Quillen?
4 And then we will give Mr. Davis a chance to interpose his
11:06:13 5 objections.

6 MR. QUILLEN: Yes. And I think I can probably
7 accelerate the discussion. There were nine exhibits that were
8 objected to, and that was 32, 33, and 34, 42 and 43, 51 and 52,
9 60 and 61. We don't intend to rely on those in our proposed
11:06:38 10 findings of fact and conclusions of law. And we did not refer
11 to them in this hearing. So we are fine with just withdrawing
12 them for purposes of this preliminary injunction hearing.

13 JUDGE MARCUS: Okay. So 42, 43, 51, 52, 60, 61, and
14 32 to 34 are not offered and not received. Do I have that
11:06:58 15 right?

16 MR. QUILLEN: That's right. There is one other issue
17 that we wanted to cover, though.

18 JUDGE MARCUS: Sure.

19 MR. QUILLEN: On ECF number 70, on the Singleton
11:07:10 20 docket, is a set of stipulations of fact between the Singleton
21 plaintiffs and the state that was not on the exhibit list, but
22 it's been agreed to by the Singleton plaintiffs and the state.
23 So just to make sure that it is, you know, reflected in the
24 record here, we would like to introduce that as Exhibit -- I
11:07:34 25 guess we will call it S-70.

1 JUDGE MARCUS: That would be Singleton 70, right?

2 MR. QUILLEN: Yes. We will call it Singleton 70. And
3 I think our understanding would be consistent with the other
4 exhibits that have come in, that the other plaintiffs wouldn't
11:07:49 5 be bound by it, but could use it if they saw fit.

6 JUDGE MARCUS: But it would be coming in to the record
7 in these proceedings?

8 MR. QUILLEN: Yes, it would.

9 JUDGE MARCUS: Any objection, Mr. Davis?

11:08:00 10 MR. DAVIS: Mr. Quillen, is this the second set of
11 stipulations that we entered into?

12 MR. QUILLEN: That's correct.

13 MR. DAVIS: No objection from the defendants, Your
14 Honor.

11:08:07 15 JUDGE MARCUS: Does anyone else have any objection to
16 the receipt of Singleton 70?

17 MR. ROSS: Your Honor.

18 JUDGE MARCUS: Yes.

19 MR. ROSS: The Milligan -- I wanted to be clear that
11:08:18 20 this is -- that those stipulations will not be used in the
21 Milligan case at all. We just -- we didn't have any part of
22 drawing up those stipulations.

23 JUDGE MARCUS: I understand. So you are not relying
24 on them and you are not using them. I understand the point.

11:08:33 25 MR. ROSS: Yes.

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1 JUDGE MARCUS: This is just a piece of evidence that
2 the Singleton plaintiffs have offered, and the state has no
3 objection to it.

4 Anything else on that, Ms. Khanna, for the Caster
11:08:47 5 plaintiffs?

6 MS. KHANNA: Only to echo what Mr. Ross said. This
7 has no part of the Caster case, and we certainly have not
8 agreed or stipulated to any of those.

9 JUDGE MARCUS: Okay. With that, let's turn,
11:09:00 10 Mr. Davis, to your exhibits. Most of them were received, but
11 there were some objections, and I wanted to go briefly to those
12 to see where we were.

13 My record shows we have received following: Defendants' 1
14 to 14, 19 to 26, 31 to 48, 50 to 67, 69 to 71, Defendants'
11:09:30 15 Exhibits 72 and 73 inclusive to 91, Defendant's Exhibits 98 and
16 99, Defendants' Exhibits 107 to 137 inclusive, Defendant 138,
17 Defendant 142, Defendant 144, Defendant 145, Defendant 147 to
18 149, Defendant 155, Defendants' 159 to Defendants' 161,
19 Defendant 164, 165 inclusive to 71. There had been an
11:10:18 20 objection to Defendants' 72, but that objection was dropped, if
21 I recall that and have that properly listed. And so Defendant
22 172 will come in.

23 Do I have all of these of these correct, Mr. Davis? I'm
24 sorry, Mr. Davis. You are muted.

11:10:43 25 MR. DAVIS: Apologies. Yes, Your Honor. That's

1 consistent with my notes.

2 JUDGE MARCUS: Okay. So let's go to the couple that
3 are -- or appear to still be in dispute.

4 The first one I have was Defendant Exhibit 15. That was a
11:11:00 5 public hearing transcript of the joint legislative committee on
6 reapportionment going back to the '92 drawings. This was a
7 hearing that occurred on June the 14th, '91, if I have that
8 right. Do I have that right, Mr. Davis?

9 MR. DAVIS: Yes, Judge.

11:11:20 10 JUDGE MARCUS: And the objection I think the Milligan
11 folks raised was A, it wasn't relevant, at least as far as they
12 could see; and, B, that it was hearsay to the extent you were
13 offering it for the truth of its contents.

14 Do you want to tell me your response to the relevance and
11:11:43 15 hearsay objection, assuming Defendant 15 is still objected to
16 by the Milligan folks. Mr. Ross?

17 MR. ROSS: Yes, Your Honor. We also have foundation
18 objection, as well.

19 JUDGE MARCUS: Okay. Mr. Davis?

11:11:59 20 MR. DAVIS: Well, the foundation objection is new. It
21 wasn't raised until yesterday. On the joint status report,
22 it's only relevant hearsay that were addressed.

23 JUDGE MARCUS: Correct.

24 MR. DAVIS: I would say this: All of these historical
11:12:14 25 documents about the congressional records were 15 plus many

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1 others. We think, of course, their relevant when talking about
2 the districts. We have said many times that Alabama is
3 preserving the core of districts. Knowing how they got the way
4 they got we think is directly relevant to the considerations
11:12:34 5 before the Court. And if the Court chooses to put less weight
6 on some of it than others, it certainly can do so. But, of
7 course, of these records of how the '92 plan got developed, how
8 the 2001 plan got developed and the 2011 and the 2021 are
9 relevant.

11:12:55 10 As far as hearsay, these are official transcripts -- 15,
11 16, and 17 were the public hearings. And the Court has a great
12 deal of leeway to consider hearsay evidence and preliminary
13 injunction hearing.

14 I would add, too, in terms of foundation, authenticity,
11:13:19 15 pardon me, these are 30-year old documents. We can give you a
16 declaration that says when we got the request for production
17 from the Milligan plaintiffs, we went as they requested us to
18 do and looked for records related to preclearance of these old
19 congressional plans and any other documents that we had about
11:13:37 20 congressional districting. We found these in our filing
21 cabinets and our storage records in the office. We think
22 that's sufficient for -- to consider these 30-year old
23 documents authentic.

24 But also, believe it or not, for 15, 16, and 17, yesterday
11:13:56 25 afternoon, we found the reporter who took down these

1 transcripts and we can give you a declaration from him, as
2 well. So I don't know why we need to fight over these. That's
3 --

4 JUDGE MARCUS: In connection with what Mr. Davis said,
11:14:11 5 does that satisfy you on authenticity, Mr. Ross?

6 MR. ROSS: I believe so, Your Honor. We --

7 JUDGE MARCUS: You still have your objections. That's
8 not -- your objection still should be addressed regarding
9 relevancy and hearsay, but let me ask you a couple of questions
11:14:29 10 about that.

11 Why wouldn't it be relevant insofar as it bears on the
12 issue of intent for the drawing of the '92 maps since the claim
13 has been made that essentially the successive iterations or
14 maps built on the foundation of the '92 map, and doesn't this
11:14:54 15 bear on the intent of the Legislature back then, the
16 transcript? And on the equal protection claim you've raised?

17 MR. ROSS: The racial predominance claim? Your Honor,
18 my concern is that it appears that Mr. Davis is intending to
19 use this not with respect to the racial gerrymandering claim,
11:15:12 20 but with respect to the Section 2 claim. We don't think that
21 it has a bearing on our current Section 2 claim, which is
22 solely about discriminatory effects.

23 I understand your point, Your Honor, that it could have
24 some bearing on why they drew the majority-black district that
11:15:32 25 they drew, and that they have -- from our perspective carried

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1 forward to today.

2 But as I said, we don't think it has any bearing on our
3 Section 2 claim at all.

4 JUDGE MARCUS: Are you offering it on both or just on
11:15:45 5 the equal protection claims that have been made?

6 MR. DAVIS: I do not know, Your Honor, for sure if we
7 will cite to these documents addressing the Section 2 claim. I
8 think we could. There could be history of the districts could
9 relate to communities of interest which we think would be very
11:16:08 10 relevant to the Section 2 claim. But the Court will be able to
11 discern whether it's due any weight for one claim or another.

12 JUDGE MARCUS: I understand. I will say in a
13 preliminary injunction hearing, the law is pretty clear that
14 hearsay may be considered and received insofar as the materials
11:16:32 15 are sufficiently relevant and insofar as there is a sufficient
16 indicia of reliability and trustworthiness.

17 We will -- I take it the argument on 15 is the same as the
18 argument on Defendant Exhibit 16, which is the public hearing
19 from the same joint legislative committee, August 21, '91, and
11:17:01 20 the same argument for the public hearing transcript of the
21 joint legislative committee on October 2nd, '91, the same
22 objections -- relevancy, hearsay -- pertain to all three, so
23 there will be nothing more we have to say about those.

24 Do I have that right, or is there something you wanted to
11:17:22 25 add, Mr. Ross?

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1 MR. ROSS: That's right, Your Honor, 15, 16, and 17.

2 JUDGE MARCUS: All right. We will reserve, give the
3 judges the opportunity to address it, and decide.

4 I should say parenthetically that you can make use of
11:17:36 5 whatever exhibits we've reserved on if you deem it appropriate
6 in the course of your closing argument. This is a three-judge
7 panel. We are the triers of the fact and the law, and we do
8 not have a jury here.

9 The next one was Defendants' Exhibit 18. That was --
11:18:03 10 Mr. Davis, but my question is, wasn't that already received in
11 evidence? Wasn't this a duplicate of what came in, in one of
12 your other exhibits?

13 MR. DAVIS: I don't know if that's the case or not. I
14 have no interest in a duplicate exhibit. If someone can assure
11:18:21 15 me...

16 JUDGE MARCUS: I just -- what's the objection to that,
17 Mr. Ross, the DOJ objection letter?

18 MR. ROSS: That was the only objection, Your Honor. I
19 believe it already came in through one of the Milligan
11:18:31 20 exhibits. But if not, our only objection was to flag for them
21 that it was a duplicate of something we thought had already
22 been admitted into evidence.

23 JUDGE MARCUS: Thanks very much. So the record is
24 clear, Mr. Davis, Defendant 18 is received.

11:18:44 25 MR. DAVIS: Thank you.

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1 JUDGE MARCUS: Whether it's a duplicate or not. This
2 way we will make sure we haven't made a mistake in that.

3 MR. DAVIS: I appreciate that.

4 JUDGE MARCUS: Defendant 27, there was an objection
11:18:54 5 to. That was the 2011 plan cited in *Alabama v. Holder*.

6 What were you seeking to put in there, Mr. Davis, and why?
7 There was an objection on the grounds of relevance, and the
8 question was what relevance this has to the 2021 map and the
9 Section 2 claim.

11:19:25 10 MR. DAVIS: And, Judge, in 2011, Alabama sought
11 preclearance, both through the administrative process and
12 through the judicial process. To our way of thinking, this was
13 just part of the story of how the maps came to be what they
14 are.

11:19:38 15 JUDGE MARCUS: And your objection, Mr. Ross?

16 MR. ROSS: Your Honor, we stipulated that the maps
17 were precleared, and as the Court well knows, Section 5
18 preclearance doesn't mean anything. It has no bearing
19 whatsoever on the current process at all.

11:19:53 20 So we don't think that these -- the fact that the state
21 filed this lawsuit is relevant at all, particularly because we
22 have already stipulated that it gained preclearance in 2011.

23 JUDGE MARCUS: Help me with this what happened here.

24 Did the Department of Justice basically give its blessing
11:20:09 25 to the 2011 plan? And if the answer to the question is yes,

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1 wouldn't that bear on the 2021 plan insofar as it basically
2 copied in the main -- the plan from '11? Just help me
3 understand this.

4 MR. ROSS: Two points, Your Honor. One, as I said,
11:20:31 5 and as you know, Section 5 of the Voting Rights Act expressly
6 says that preclearance does not mean that the Justice
7 Department is giving its blessings. The Section 2 standard is
8 separate from the Section 5 standard, so the Section 5 standard
9 was only essentially retrogression, did you decline to draw a
11:20:49 10 majority-black district. It doesn't consider whether or not
11 you failed to draw a second majority-black district. And so
12 that -- that is our the basis of our -- I mean, it's not the
13 basis for our relevance objection, but is why I said we didn't
14 think the prior clearance is relevant at all.

11:21:08 15 JUDGE MARCUS: I understand. Mr. Davis, anything
16 further on that?

17 MR. DAVIS: Judge, whether preclearance or not has any
18 legal significance, the Court can sort out. These documents
19 related to the preclearance effort contain a lot of helpful
11:21:19 20 information. Because we told the Department of Justice, here
21 are the districts, here are the demographics of the districts.
22 We think it provides a lot of helpful information within those
23 documents about the plan that was being submitted.

24 MR. ROSS: Your Honor, if I may.

11:21:34 25 JUDGE MARCUS: Sure.

1 MR. ROSS: We -- we can't -- the fact that they filed
2 a complaint doesn't establish any facts whatsoever. We filed a
3 complaint. That doesn't mean that in ten years someone could
4 we rely on it and say all the things in our complaint are true,
11:21:49 5 so we don't think it has any bearing except perhaps to show
6 they filed a complaint.

7 JUDGE MARCUS: I understand. We will reserve on that.
8 I take it the same issues obtained for Defendant 28 and 29,
9 same objection, right? Mr. Ross?

11:22:13 10 MR. ROSS: Yes, Your Honor.

11 JUDGE MARCUS: Okay. We will reserve on 28 and 29.

12 And I guess 30 falls into the same thing. That was simply
13 an errata sheet correcting Defendant 27, if I have that right.
14 Do I have that right, Mr. Davis? You're muted, Mr. Davis.

11:22:34 15 MR. DAVIS: Yes, Your Honor, that's correct.

16 JUDGE MARCUS: Okay. So we will reserve on 27 to 30
17 inclusive.

18 The next one was Defendant 49. That was the annual report
19 -- 2020 annual report of the state personnel board issued by
11:22:54 20 the Alabama State Personnel Department.

21 If I understood the objection, it was a relevancy object,
22 right?

23 MR. ROSS: Yes, Your Honor. And there was a
24 foundation issue. We don't know where the document came from
11:23:13 25 or who created it.

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1 JUDGE MARCUS: Mr. Davis?

2 MR. DAVIS: Well, as for relevance, Your Honor, the
3 plaintiffs' experts have made various contentions, including
4 whether there's discrimination in state government in the
11:23:25 5 employment of state government. And this report provides
6 statistics for how many people who work in state government are
7 African-American. And African-Americans are disproportionately
8 represented in government.

9 As far as foundation, that's not raised until today. And
11:23:40 10 so we think it's too late to add that objection. If it had
11 been raised earlier, I might have been able to address it
12 between now and the date that our objections were due.

13 MR. ROSS: The only additional point on that is that
14 our experts testified about federal court cases finding that
11:24:02 15 Alabama engaged in racial discrimination. And so this has no
16 bearing whatsoever about how many black people may work for the
17 state if they're being discriminated against as federal courts
18 have found repeatedly.

19 JUDGE MARCUS: I think we have our objection. We will
11:24:16 20 reserve on it.

21 The next one is Defendants' 68. That was the application
22 of a former Secretary of State back in 1992 who was an
23 appellant in the Supreme Court in the *Wesch* litigation.

24 And there was an objection there.

11:24:41 25 Your objection there, Mr. Ross, was?

1 MR. ROSS: Your Honor --

2 JUDGE MARCUS: One was --

3 MR. ROSS: Your Honor, I -- the basis for the hearsay
4 objection was the same concern that I just raised with the
11:24:54 5 complaint. The fact that you filed a complaint or filed a
6 brief in court doesn't mean that the Court can take anything
7 from the allegations or facts in that brief for complaint. And
8 so we just have a concern that the state as Mr. Davis said is
9 trying to rely on this for facts and anything else.

11:25:13 10 JUDGE MARCUS: Mr. Davis?

11 MR. DAVIS: Judge, we think this is part of the
12 history of the *Wesch* litigation. It's not just relying on what
13 Secretary Kemp said or what he alleged in his pleadings, but
14 the fact of who was doing what -- who was for the plan, who was
11:25:30 15 opposed to the plan, who was appealing, who was seeking a stay.
16 We think that's part of the story of the '92 plans and ought to
17 be considered for making the record complete.

18 JUDGE MARCUS: I take it the same issues obtained with
19 regard to Defendants' 92 and Defendants' 93 to 97. That
11:25:52 20 appears to be an appendix to a brief submitted in the *Wesch*
21 litigation from the appellees in the case. 92 was a letter as
22 best I can tell from the Department of Justice to the Alabama
23 Attorney General regarding the '92 map. It was a single
24 document. There the question was really what relevance this
11:26:22 25 has.

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1 I know as a general matter it tells a story about what
2 happened in '92. But this -- does this letter from the
3 Department of Justice have any bearing on any issue in this
4 case?

11:26:37 5 MR. DAVIS: I'm sorry, Your Honor.

6 JUDGE MARCUS: It may, but it just didn't jump off the
7 page at me when I looked at it.

8 MR. DAVIS: Which exhibit are you referring to at the
9 moment?

11:26:46 10 JUDGE MARCUS: 92. Defendant 92.

11 I moved on from 68 to the Defendant 92, which, as I
12 understood it, was an appendix to the brief of one of the
13 parties in the *Wesch* litigation. And the only thing in that
14 exhibit was a single letter from the Department of Justice to
15 the Alabama Attorney General regarding the '92 map, and in it,
16 there was apparently no objection interposed by the Department
17 of Justice. It bore on a deadline, the qualifying deadline,
18 and that struck me as having nothing to do with even the story
19 in the broadest sense.

11:27:40 20 MR. DAVIS: Oh. I -- 92, I am looking at, Judge,
21 seems to have more to it than that.

22 JUDGE MARCUS: That was the only thing. I may have
23 missed it.

24 Now, with regard to 93 to 97, there are other pieces of
11:27:56 25 the appendix to the jurisdictional statement filed by Alabama.

1 And I was just talking about 92 appeared to be only a
2 single letter from the Department of Justice regarding a
3 qualifying deadline that didn't seem to me to have any bearing
4 on this case taking the broadest view of relevance that I could
11:28:22 5 think of. I mean --

6 MR. DAVIS: I will share if I can, Judge. I show a
7 motion to dismiss or affirm and who was asking to do so or not.

8 JUDGE MARCUS: Is this part of 92?

9 MR. DAVIS: Yes, Judge. It's part of 92 on the pdf I
11:28:38 10 have.

11 JUDGE MARCUS: Okay. So I may have not properly
12 characterized it.

13 What's in Defendant 92? Why don't you lay that out for
14 me?

11:28:46 15 MR. DAVIS: It is -- I'm struggling to keep all these
16 separate.

17 JUDGE MARCUS: Sure. Take your time.

18 MR. DAVIS: It's part of -- it is appellee Wesch's
19 motion to dismiss or affirm. I show it as a 15-page pdf. The
11:29:06 20 letter you are referring to -- the letter is part of it.

21 JUDGE MARCUS: Okay. So it includes the letter, but
22 it was the brief, the whole brief?

23 MR. DAVIS: Correct, Judge.

24 JUDGE MARCUS: Is there an objection to that,
11:29:20 25 Mr. Ross? You can take that down. Thanks.

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1 MR. ROSS: Your Honor, again, our concern is obviously
2 the Court can take judicial notice of someone having filed a
3 brief. Our concern is that the state is trying to use it for
4 more than that. It's trying to say that the things that are in
11:29:35 5 the brief are true or not true, and we don't think that's
6 appropriate at all.

7 JUDGE MARCUS: Anything further on that? If not, we
8 will reserve.

9 Okay. The next grouping was Defendants' 93 to Defendant
11:29:50 10 97 inclusive. And I saw that as a series of attachments in an
11 appendix to the jurisdictional statement filed in the Supreme
12 Court. Again, it related to 1992. Do I at least have an
13 accurate description of what's in 93 to 97?

14 MR. DAVIS: Yes, Judge. We think it has helpful
11:30:21 15 information about the procedural history of the *Wesch*
16 litigation.

17 JUDGE MARCUS: Anything further on the point,
18 Mr. Ross, beyond what's already been said?

19 MR. ROSS: No, Your Honor. The same relevancy and
11:30:35 20 hearsay arguments.

21 JUDGE MARCUS: We will reserve on 93 to 97.

22 The next grouping were Defendants' exhibits 100 to 106
23 inclusive. Those were the preclearance submissions made by
24 Alabama to the Department of Justice, regarding the 2011 maps.

11:30:57 25 Have I described it accurately?

1 MR. DAVIS: Judge, these were exhibits to a
2 preclearance submission.

3 JUDGE MARCUS: Right.

4 MR. DAVIS: Each is a different map that was proposed.

11:31:08 5 JUDGE MARCUS: Right. Right. Now, as I understood
6 the objection, it was a singular objection by Mr. Ross, maybe
7 fell into the category of the doctrine of completeness. He
8 didn't object to what you offered. He objected because you
9 only chose a small piece of it, and you wanted it all in. Do I
11:31:30 10 have that right, Mr. Ross, or have I mischaracterized that?

11 MR. ROSS: I think that's generally true, Your Honor.
12 I think it also was that we frankly may not have had the
13 opportunity to confirm or whether or not this was everything
14 that was submitted with the map, and, you know, again these are
11:31:45 15 things that are older. And so that was the basis of our
16 concern, yes.

17 JUDGE MARCUS: So if he puts everything in and shows
18 it to you, you will have no objection, if I hear you right?

19 MR. ROSS: That's right, Your Honor. We can withdraw
11:32:02 20 the objection, just to make things easier for the Court.

21 JUDGE MARCUS: Okay. So let's make sure, Mr. Davis,
22 that you include the whole kit and caboodle, not just picking
23 your way through the preclearance submission. Does that work
24 for you?

11:32:17 25 MR. DAVIS: Of course. I don't know of anything this

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1 is missing. I don't think anything is. If there is, Mr. Ross
2 has it, and he's welcome to put it in. Produced.

3 JUDGE MARCUS: Mr. Ross, is there something missing
4 that you cannot isolate and point out?

11:32:32 5 MR. ROSS: At this moment -- I'm sorry. At this
6 moment, Your Honor, I guess I would -- this is more of a -- we
7 were working on this quickly over the holiday, so that may have
8 been the issue. I'm sorry.

9 JUDGE MARCUS: All right. We will receive Defendants'
11:32:45 10 100 to 106. We will give you the opportunity to speak with
11 Mr. Davis and come back with something else if it has been
12 excluded. And we will give you until the end of business
13 tomorrow just to let us know if you would be kind enough on
14 that.

11:33:00 15 With that caveat, Mr. Davis, we receive Defendant 100 to
16 106 inclusive.

17 The next item was Defendant 138. That was the
18 reapportionment committee guidelines from 2011.

19 I think the objection there was relevancy, Mr. Ross?

11:33:22 20 MR. ROSS: Yes, Your Honor. Yes. That was our
21 concern was that if it were relevant or not.

22 JUDGE MARCUS: I think it came up in the course of an
23 examination of one of the witnesses.

24 Mr. Davis, comment about 138.

11:33:44 25 MR. DAVIS: Yes. Trey Hood was -- Dr. Trey Hood was

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1 asked yesterday about the 2011 guidelines and whether it did or
2 it did not include observing the core of districts as a
3 guideline. Right.

4 MR. ROSS: Your Honor -- sorry. Just to save time, we
11:34:06 5 will drop the objection.

6 JUDGE MARCUS: All right. We will receive Defendant
7 138.

8 139 from the defendant related to the *Thompson v. Merrill*
9 litigation, if I have that right. And what it was, was an
11:34:21 10 interrogatory to the Alabama board of pardons. And I wasn't
11 sure that I understood what the relevance was in that regard.
12 And I think the same issue came up with regard to Defendant
13 140. Do I have that right, Mr. Ross, the basis of your
14 objection?

11:34:49 15 MR. ROSS: Yes, Your Honor.

16 JUDGE MARCUS: Mr. Davis?

17 MR. DAVIS: We agree those two should be considered
18 together.

19 The relevance is responding to plaintiffs' experts. Their
11:35:03 20 Senate Factor experts talk about the proportionality of people
21 who have been disenfranchised because of felony convictions.
22 This is sworn testimony. I do not know as I'm sitting here if,
23 in fact, we will cite to it. But we do think that because this
24 sworn testimony addresses the felon disenfranchisement and --
11:35:25 25 that it does relate to what plaintiffs' experts have alleged

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1 concerning felon disenfranchisement in Alabama.

2 JUDGE MARCUS: The heart of the objection was
3 relevancy and hearsay or just relevancy?

4 MR. ROSS: Relevance and hearsay, Your Honor, but, you
11:35:43 5 know, I think the primary concern was that the state should
6 have someone come and testify about what this is and where it's
7 coming from and shouldn't just be allowed to drop in all these
8 documents which we have never seen before and have not heard
9 anyone testify about today. And I think, again, there's a
11:36:00 10 relevance concern, because this is from, again, from some other
11 litigation -- actually, this Court -- that the state is trying
12 to bring in.

13 JUDGE MARCUS: Mr. Davis, how do we know that it is
14 what it purports to be from the Alabama Board of Pardons and
11:36:16 15 Parole? That is one of the points that he's at least raising.

16 MR. DAVIS: It's sworn testimony, Judge. And these
17 are documents from this litigation. It's --

18 JUDGE MARCUS: I'm sorry. Could you help me? Whose
19 sworn testimony does it embody?

11:36:33 20 MR. DAVIS: Lee Gwaltney a member of the Alabama Board
21 of Pardons and Paroles.

22 JUDGE MARCUS: Okay. We will reserve on 139 and 140.
23 The next one was Defendant 141, which was an article from
24 the BBC News purporting to address or explain why President
11:37:04 25 Trump got support from minorities in 2020.

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1 Were you offering that for the truth of its contents,
2 Mr. Davis?

3 MR. DAVIS: Yes. And I don't think that's -- I don't
4 think this came up in any exam. I'm told maybe it did.

11:37:23 5 JUDGE MARCUS: It did, but only -- if my recollection
6 is right, only very, very briefly.

7 Is there any objection to this, Mr. Ross?

8 MR. ROSS: Yes, Your Honor. They said they're trying
9 to use it for anything that's -- we don't think it's relevant.
11:37:39 10 We think it has multiple layers of hearsay.

11 JUDGE MARCUS: Mr. Davis? Why should we take the BBC
12 report, news report as telling any -- us anything about why
13 President Trump got support from minorities in 2020? It all
14 may be absolutely true and easily provable. His objection is
11:38:05 15 this isn't the way to prove it.

16 MR. DAVIS: I have nothing to add to what Mr. Barrett
17 may have added yesterday.

18 JUDGE MARCUS: We will reserve on 141.

19 The next one was Defendant 143, if I have it right.
11:38:20 20 Supplemental stipulation in the *Wesch* litigation in '92. There
21 was a statement that according to the 1990 data, the district
22 was large enough to create -- or the population was large
23 enough to create a single majority-minority district. I think
24 the objection there was relevancy. Do I have that right,
11:38:54 25 Mr. Ross?

1 MR. ROSS: Your Honor, we could drop the objection to
2 -- I think this is -- the same information is already in the
3 opinion in the case, so we will drop the objection.

4 JUDGE MARCUS: Without objection, Mr. Davis, 143 is
11:39:05 5 received.

6 144 and 145, those concern the deposition of Mr. Hinaman,
7 which we have. Is there some reason we shouldn't consider
8 this, Mr. Ross?

9 MR. ROSS: Your Honor, I believe we included a copy of
11:39:26 10 that yesterday.

11 JUDGE MARCUS: Okay. So 144 and 145 are received.
12 Those were the -- Mr. Davis, can you hear me okay?

13 MR. DAVIS: I can now, Your Honor. You faded out on
14 my screen.

11:39:54 15 JUDGE MARCUS: I'm sorry. 144 and 145 are received.
16 Those are the two parts of Mr. Hinaman's deposition.

17 The next item I have to which there was an objection was
18 Defendant 146. That was the 2000 map of the population
19 regarding the State Board of Education and the state of
11:40:23 20 Alabama, and it was broken down by counties, and there were
21 various statistics that were being offered. If I understand
22 the objection, that was relevancy, Mr. Ross?

23 MR. ROSS: Yes, Your Honor. And it's also -- frankly,
24 looking at the exhibit, it's difficult to even tell what one
11:40:44 25 can take from it since the lines -- it's not -- you can't

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1 really tell what the State Board of Education lines were.

2 JUDGE MARCUS: We're having trouble -- Mr. Ross, we
3 are having trouble hearing you.

4 MR. ROSS: I'm sorry. Give me one moment, Your Honor.

11:40:59 5 JUDGE MARCUS: Sure. Take your time.

6 MR. ROSS: Sorry, Your Honor. Can you hear me now?

7 JUDGE MARCUS: Hear you perfectly. Mr. Davis, are you
8 able to hear Mr. Ross?

9 MR. DAVIS: Yes, Judge. I can hear.

11:41:29 10 JUDGE MARCUS: Thank you.

11 MR. ROSS: Thank you. So I think our primary concern
12 just looking at the document is that it's difficult to tell
13 what it even purports to represent since there's -- it's not
14 clear what the district lines are that they're showing. And so
11:41:47 15 the rest of the information also doesn't appear to be
16 particularly helpful or relevant.

17 JUDGE MARCUS: Mr. Davis?

18 MR. DAVIS: The maps appear elsewhere in the record,
19 Judge, and just the statistics of the plan. The plaintiffs are
11:42:03 20 arguing that because Alabama made certain decisions in its
21 board of education map that it would be okay to make those same
22 decisions in the congressional map, and we strenuously disagree
23 with that. But we want to tell the story of how these board of
24 education maps got to be the way they are. And Your Honor
11:42:21 25 asked Mr. Byrne about that briefly just today. And we think we

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1 can tell the story that how it didn't split Mobile County in
2 the '90s, it didn't in the 2000, it did for the first time in
3 the 2010s because they needed to add population and because
4 Alabama was subject to Section 5. This is part of that story.

11:42:41 5 JUDGE MARCUS: Let me ask one question: If I heard
6 Mr. Ross right, one of the concerns he had was just it wasn't
7 clear, legibility, the lines weren't clear. Are they clear in
8 this report? 146?

9 MR. DAVIS: I would say that the map itself is not
11:42:58 10 very clear. It's hard to tell the difference between a county
11 line and a district line. These districts statistics are quite
12 clear, and we believe that the historical map's presented
13 elsewhere in the case, including in Mr. Cooper's report.

14 JUDGE MARCUS: Thank you. We will reserve.

11:43:14 15 Defendant 150. This purported to be a study showing
16 morbidity rates. This came from the CDC. I think it was March
17 of '21 that it came from. I take it you are offering it as a
18 public record.

19 MR. DAVIS: Yes, Judge. It was referenced in
11:43:40 20 Dr. McIntosh's declaration that we submitted and that is in
21 evidence.

22 MR. ROSS: We will drop our objection.

23 JUDGE MARCUS: No objection? Without objection,
24 Defendant 150 is received.

11:43:50 25 152, it had been marked for identification. We have

1 already sustained that objection. That was the Wall Street
2 Journal article being offered for its truth, if I have that
3 right.

4 Did you want to say anything more about that?

11:44:07 5 MR. DAVIS: No, Your Honor. We consider that issue
6 resolved.

7 JUDGE MARCUS: Okay. Defendant 153, that was an
8 article that came from a sentencing project think tank, if I
9 have that right.

11:44:24 10 Anything further on that one? Mr. Ross or Mr. Davis?

11 MR. ROSS: No, Your Honor, just reminding the Court
12 that we don't think anything about other states is relevant.

13 JUDGE MARCUS: Mr. Davis, any comment you had wanted
14 to make, to make this record complete?

11:44:41 15 MR. DAVIS: No, nothing to add, Judge.

16 JUDGE MARCUS: All right. The next one was 154. That
17 was another newspaper article.

18 Any comment about that?

19 MR. ROSS: Just the layers of hearsay, Your Honor.

11:44:59 20 MR. DAVIS: Judge, I do not think this came up in any
21 -- in any witness examination. We thought it of import that a
22 congress -- a state representative from Mobile, an
23 African-American Democrat woman was talking about keeping
24 Baldwin and Mobile County together, but we didn't have the
11:45:21 25 opportunity to question any witness about that.

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1 JUDGE MARCUS: Are you still offering it?

2 MR. DAVIS: Sure. I will offer it for the record.

3 JUDGE MARCUS: All right. We will reserve on it.

4 Just so the record is clear, this was a newspaper article about
11:45:38 5 what a congressman may have said.

6 Defendant 155, voter determination letter from the
7 Department of Justice. I think the date was May 18, 2020.

8 MR. ROSS: I believe we dropped that objection if it's
9 -- I think it's just the list of Section 5 objections in
11:45:59 10 Alabama. And if so, we dropped that objection.

11 JUDGE MARCUS: He has got that description right, does
12 he not, Mr. Davis?

13 MR. DAVIS: Yes, that is correct.

14 JUDGE MARCUS: We will receive Defendant 155.

11:46:11 15 Defendant 156, that was the felony voting rights statement
16 prepared by the Alabama Secretary of State apparently. Do we
17 have an objection to that at this point, Mr. Ross?

18 MR. ROSS: Your Honor, it was the same relevance
19 concern. I don't think any of our -- anyone on our side
11:46:31 20 testified about that or anyone else from the Secretary of
21 State.

22 JUDGE MARCUS: Is it a public record under 803(8) of
23 the Federal Rules of Evidence, Mr. Ross?

24 MR. ROSS: Yes, Your Honor. We will drop the
11:46:45 25 objection.

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1 JUDGE MARCUS: All right. 156 is received.

2 157 was an article, Mr. Davis, you had offered from the
3 Montgomery Adviser. It was an Alabama Senate profile, and
4 there was a comment by Robert Kennedy, Jr. That was in 157.
11:47:08 5 The objection was, I take it, hearsay, Mr. Ross?

6 MR. ROSS: Hearsay and relevance, Your Honor.

7 JUDGE MARCUS: Mr. Davis?

8 MR. DAVIS: Your Honor, this -- Mr. Kennedy was a
9 candidate who -- or the voting rights expert, Dr. Palmer, and
11:47:33 10 Dr. Liu looked at the election, so we wanted the profile in to
11 confirm his race and the opponent in the election and that he
12 also ran in 2017 in an election that I don't think was
13 considered by one or both of plaintiffs' experts.

14 JUDGE MARCUS: So you're offering it for the truth of
11:47:52 15 its contents as to each of those points?

16 MR. DAVIS: For the characteristics of Mr. Kennedy and
17 for which elections he was a candidate in, yes.

18 JUDGE MARCUS: Mr. Ross, objection? Is that your
19 objection is hearsay?

11:48:04 20 MR. ROSS: Yes, Your Honor. And just to be clear that
21 plaintiffs obviously -- not obviously, but we understand that
22 Mr. Kennedy is African-American, and I believe that the
23 Secretary may have already put in evidence of who ran in the
24 2017 primary election. So we also, again, renew our relevance
11:48:21 25 and hearsay objections for those reasons.

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1 JUDGE MARCUS: Just one question, Mr. Davis: Does
2 this duplicate what's already in the record?

3 MR. DAVIS: I'm not sure that the 2017 information is
4 there, but it very well could be, Judge. There's a lot to keep
11:48:36 5 up.

6 JUDGE MARCUS: We will reserve on Defendant 157.

7 Defendant 158, that was the article from the economic
8 policy institute. As I understand it, that's a D.C. think
9 tank, not a public record. We've reserved on that.

11:48:54 10 Any further comment about that, Mr. Ross, Mr. Davis?

11 MR. ROSS: No, Your Honor.

12 MR. DAVIS: Nothing further, Judge.

13 JUDGE MARCUS: All right. We will reserve on 158.

14 162, that Mr. Davis offered was a report from the U.S.
11:49:10 15 commission on Civil Rights dated September 2007, if I have that
16 right. And there was a completeness objection, I believe the
17 defendant put in the front page and only six pages, but
18 apparently the claim is that there was more. And if you put
19 that in, he suggested you wanted to put the balance of it in,
11:49:37 20 as well, Mr. Davis. Do I have that accurate?

21 MR. ROSS: Yes, Your Honor. Although I am having some
22 computer issues, I can't see -- we'll just drop the objection,
23 Your Honor. If it's a government document, it's fine.

24 JUDGE MARCUS: All right. Without objection,
11:49:57 25 Mr. Davis, Defendant 162 is received.

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1 The next one was Defendant 163. Isn't that already in the
2 docket sheet, which the Court obviously can take notice of,
3 Mr. Ross?

4 MR. ROSS: Yes --

11:50:17 5 MR. DAVIS: 163 is not needed. We can withdraw
6 offering 163.

7 JUDGE MARCUS: All right. 163 has been withdrawn.

8 Same question I have on Defendant 164. All it is, is the
9 notice of the Hinaman deposition. It's noted on the docket.
11:50:32 10 I'm hard pressed to see an objection to that.

11 MR. ROSS: We had dropped that objection, I believe,
12 Your Honor.

13 JUDGE MARCUS: 164, Mr. Davis, is received.

14 I think that covered your -- your exhibits. Do I have
11:50:51 15 that right?

16 MR. DAVIS: I think that's right, Judge.

17 JUDGE MARCUS: The only thing that was left out from
18 our discussion -- so we have covered Singleton, Milligan. The
19 defendants' exhibits were the Caster exhibits, Ms. Khanna, and
11:51:10 20 we discussed them at the beginning. Just so the record is
21 clear, and you tell me if I have misapprehended any of this.

22 Caster Exhibits 1 to 93 have been received, and 95 to 104
23 have been received. The only objection was to plaintiff Caster
24 Exhibit 94, which was a COVID-tracking project from the
11:51:40 25 Atlantic, if I have that right.

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1 MS. KHANNA: Yes, Your Honor. And we will withdraw
2 Exhibit 94.

3 JUDGE MARCUS: Okay. So 94 is not being offered?

4 MS. KHANNA: That's correct. Then I think the only
11:51:51 5 other outstanding issues for Caster plaintiffs' exhibits are --
6 Caster Exhibit 105, I believe, was also admitted into the
7 record during the course of testimony. I believe those were
8 the DOJ guidelines that Mr. Bryan referred to.

9 JUDGE MARCUS: Yes, I believe that is correct. Do I
11:52:12 10 have that right, Mr. Davis?

11 MR. DAVIS: That is my recollection, as well, yes.

12 JUDGE MARCUS: It's in.

13 MS. KHANNA: And then Caster 106 is the amicus brief
14 that Mr. Bryan co-authored in the *Evenwel* Supreme Court case,
11:52:25 15 and I believe that Mr. Davis and I were supposed to confer on
16 what redactions would be appropriate. We sent him a copy just
17 this morning. I know he was in with Representative Byrne, so
18 happy to work that out over the course --

19 JUDGE MARCUS: What's your sense of this one,
11:52:41 20 Mr. Davis?

21 MR. DAVIS: I am confident we will work it out. I
22 have not had a chance to look at the document yet.

23 JUDGE MARCUS: If you would let us know in the next
24 day or two, we would be much appreciative.

11:52:51 25 MR. DAVIS: Gladly.

1 JUDGE MARCUS: Ms. Khanna, was there another one, 107?

2 MS. KHANNA: I believe that's it. I think we have
3 everything resolved for Caster plaintiffs.

4 JUDGE MARCUS: Okay. We have covered the exhibits.

11:53:01 5 The ones we have reserved on, as I said, the judges will confer
6 and give you a ruling when we give you written opinion in the
7 -- in the case.

8 Which brings us then I take it we're at the point where
9 we're ready for closing argument. It may be appropriate to
11:53:20 10 break. It's just a little bit before 12:00. I have 11:53
11 Central Standard Time.

12 So perhaps we should take our lunch break now, and then
13 come back in one hour and proceed with closing. That works for
14 everyone?

11:53:40 15 MR. BLACKSHER: Yes, Judge.

16 MR. DAVIS: Yes, Judge.

17 JUDGE MARCUS: Okay. Have you for the plaintiffs
18 decided how you're going to break up your argument or
19 arguments?

11:53:52 20 MR. BLACKSHER: Yes, Your Honor. The Caster and
21 Milligan plaintiffs have graciously allowed me to proceed
22 first, followed I think by the Caster plaintiffs, and then the
23 Milligan plaintiffs in our closing arguments.

24 JUDGE MARCUS: And as I said, we gave you a total of
11:54:12 25 an hour and a half to be divided up any way you want. Have you

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1 reached any determination about that?

2 MR. BLACKSHER: I guess we were thinking it was just
3 30 minutes apiece, and, you know, I'm not sure that I will take
4 30 minutes, but I commit not to do more than that.

11:54:33 5 JUDGE MARCUS: All right. We will leave that to you.

6 And who will be making the argument for Caster, and who will be
7 making the closing argument for Milligan?

8 MS. KHANNA: Your Honor, I will be making the argument
9 for Caster.

11:54:48 10 MR. ROSS: And, Your Honor, it will be myself and my
11 colleague who will be doing the closing for Milligan.

12 JUDGE MARCUS: And you are free to split up your
13 arguments between your lawyers any way you see fit. That's not
14 an issue.

11:54:59 15 One final question before we break for lunch that I have:
16 Did you intend to reserve any of your time for rebuttal? We
17 have given the hour and a half, Mr. Davis, Mr. LaCour, you have
18 that full 90 minutes to respond to the three closing arguments
19 by each of the three sets of plaintiffs.

11:55:21 20 I just wanted to know whether they intended to reserve any
21 time for rebuttal.

22 MR. BLACKSHER: Singleton would like to reserve a
23 little time, maybe five minutes or ten minutes at most.

24 JUDGE MARCUS: Okay.

11:55:34 25 MS. KHANNA: Same with Caster, Your Honor, about

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1 five minutes, maybe 15 to 20 between all three of us, I would
2 imagine.

3 MR. ROSS: Same, Your Honor.

4 JUDGE MARCUS: All right. We will leave that to you
11:55:44 5 folks.

6 And with that, it is 11:55, if I have it right. We will
7 bring you back in one hour and proceed. Does that give you
8 enough time to prepare and proceed with your closings for each
9 of the plaintiffs and the defendant?

11:56:06 10 MR. BLACKSHER: Yes, Your Honor.

11 MS. KHANNA: Yes, Your Honor.

12 MR. DAVIS: Yes, Your Honor.

13 MR. ROSS: Yes, Your Honor.

14 JUDGE MARCUS: I should say Mr. LaCour. That works
11:56:15 15 for you?

16 MR. LACOUR: Yes, Your Honor.

17 JUDGE MARCUS: We will see you folks back here in
18 one hour, and we will take up closing argument at that point.
19 Thank you all much.

11:56:26 20 (Recess.)

21 JUDGE MARCUS: I take it the parties are ready to
22 proceed with their closing statements?

23 MR. BLACKSHER: Yes.

24 JUDGE MARCUS: Mr. LaCour, you are ready, as well, and
13:00:16 25 counsel for Caster and Milligan, as well?

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1 MR. LACOUR: Yes, Your Honor.

2 MS. KHANNA: Yes, Your Honor. Although I can't -- for
3 some reason, I can't see the Court, any of the judges on the
4 Court.

13:00:27 5 JUDGE MARCUS: Can you see me? Mr. Blacksher?

6 MR. BLACKSHER: I see you, Your Honor, and I see Judge
7 Moorer, and I see Judge Manasco.

8 JUDGE MARCUS: All right. Mr. Ross, are you also
9 ready to proceed?

13:00:29 10 MR. ROSS: Yes, Your Honor.

11 JUDGE MARCUS: All right. We asked Judge Manasco's
12 deputy clerk to give you a five-minute warning when you run up
13 against your 30 minutes.

14 Having said that, Mr. Blacksher, we would be delighted to
13:01:07 15 hear from you. You may proceed.

16 MR. BLACKSHER: Thank you, Your Honor. And first of
17 all, I want to thank the Court, Judge Marcus, Judge Manasco,
18 Judge Moorer, for, first of all, giving us this hearing so
19 promptly. And secondly, for your patience as we spent, what, a
13:01:31 20 week almost in trial.

21 There is a problem here. I am getting Joe Bagley on the
22 screen and not Judge Marcus.

23 But can you see me, Judge Marcus?

24 JUDGE MARCUS: I see you and hear you just fine. Just
13:01:50 25 tell me whenever you are ready to proceed.

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1 MR. BLACKSHER: I am ready to proceed now.

2 JUDGE MARCUS: Thanks so very much.

3 MR. BLACKSHER: So it is important for the Court to
4 keep in mind that the Singleton plaintiffs have sought a
13:02:09 5 preliminary injunction based solely on Count One of their
6 amended complaint, which alleges a racial gerrymander, not
7 Count Two of the complaint, which alleges intentional
8 discrimination.

9 And the difference is important for the purposes of
13:02:29 10 understanding the racial gerrymander claim because unlike
11 intentional discrimination, the injuries suffered or found to
12 be unconstitutional in a racial gerrymander claim is the mere
13 segregation of individual voters based on their race separating
14 one from the other based on their race.

13:03:00 15 It is not an injury of vote dilution or any other
16 practical injury to the voter herself. Whereas in our second
17 count, we are alleging that the state purposefully
18 intentionally continued to adopted the 2021 plan for the
19 purpose of discriminating against black voters by denying them
13:03:31 20 an opportunity to elect members of Congress in at least two
21 districts.

22 So the issue in the racial gerrymander case resolves
23 around the 1992 decision. And think Your Honors sort of put it
24 correctly and when we were just before lunch.

13:03:56 25 There's no dispute that the 1992 gerrymander was enacted

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1 not for the purpose of discriminating against blacks, but
2 allegedly for the purpose of providing them an opportunity to
3 elect at least one candidate of their choice. And it did so by
4 splitting four counties -- Clarke, Jefferson, Tuscaloosa, and
13:04:29 5 Montgomery -- for the express purpose of creating a
6 majority-black district.

7 And the issue in this case is whether that district drawn
8 and authorized by the Voting Rights Act allegedly in 1992 can
9 still be justified by the Voting Rights Act in 2021. Because
13:04:58 10 there's no dispute -- there's no dispute that the 2021 plan
11 carries forward the 1992 racial gerrymander.

12 In their opposition to our motion for preliminary
13 injunction, the defendant said, quote, both the 2001 and 2011
14 maps maintain the cores of districts, changing them only to
13:05:26 15 equalize population. The 2011 map largely built off the 2001
16 map, which itself, built off the 1992 map.

17 JUDGE MARCUS: Mr. Blacksher, can I ask you a question
18 about what you are raising?

19 MR. BLACKSHER: Certainly.

13:05:45 20 JUDGE MARCUS: If I hear the argument clearly, you
21 seem to be saying that we have to go back to 1992 for the heart
22 of your argument, because that plan was infirm, and it
23 essentially was carried forward in each successive iteration --
24 in 2000, 2011, and 2021. That much I have right, correct?

13:06:14 25 MR. BLACKSHER: Not exactly, Your Honor.

1 JUDGE MARCUS: Okay. Put it to me exactly.

2 MR. BLACKSHER: Well, you used the word infirm. We
3 don't allege that the 1992 *Wesch* plan was constitutionally
4 infirm at that time. At that time, the parties stipulated and
13:06:33 5 the Court agreed that the gerrymander could be justified by
6 complying with Section 2 of the Voting Rights Act.

7 The three-judge district court in *Wesch* specifically said
8 they were not addressing the merits of that question, but it
9 was going to accept the stipulation of the parties that the
13:06:58 10 Voting Rights Act justified it.

11 But the next year, 1993, the Supreme Court in *Shaw v. Reno*
12 announced the racial gerrymandering cause of action, the racial
13 gerrymandering equal protection violation. That the state
14 continued to use the Voting Rights Act to justify perpetuating
13:07:30 15 the 1992 intentional gerrymander based on Section 5 of the
16 Voting Rights Act as counsel has said numerous times, the state
17 felt like it could not reduce the size -- could not reduce that
18 black-majority district District 7 because it would cause
19 retrogression in the ability of blacks to elect candidates of
13:08:00 20 their choice, and, therefore, it was -- it was in compliance
21 with Section 5, and the Justice Department signed off on their
22 submissions under Section 5.

23 But the question of whether Section 5 actually required
24 perpetuating their racial gerrymander was never litigated in a
13:08:24 25 court. It is now before the Court that precise question

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1 whether the intentional separation of voters based on their
2 race in District 7 today in 2021 still can be justified by the
3 Voting Rights Act.

4 Now, to be clear, the state's position in their response
13:08:51 5 to our complaint is not that the -- not that the Voting Rights
6 Act can justify gerrymander, but that the 2021 plan now is no
7 longer a gerrymander because the division -- the creation of a
8 majority black CD 7 in 1992 has over the years developed into
9 basically a new set of traditional redistricting principles.

13:09:30 10 It is now the core of what are traditional in the congressional
11 redistricting of Alabama districts. And that -- that is simply
12 wrong as a matter of law. And if I could -- if the Court would
13 allow me to share my screen for a second.

14 JUDGE MARCUS: Sure.

13:10:07 15 MR. BLACKSHER: Share -- I don't want to do that.

16 Sorry. Okay. Now I'm ready. I'm sorry, Judge.

17 JUDGE MARCUS: You take your time.

18 MR. BLACKSHER: So this is *Bartlett vs. Strickland*,
19 2009. And it says, Our holding also should not be interpreted
13:10:42 20 to entrench majority-minority districts by statutory command,
21 for that, too, could pose a constitutional concern. That is
22 essentially what the state is arguing in this case. That over
23 the years, that gerrymander, which was carried out under
24 authorization allegedly of the Voting Rights Act in 1992 is now
13:11:09 25 so entrenched that it is -- that it -- that the Voting Rights

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1 Act still justifies it.

2 As you can see, the majority-minority districts are only
3 required at all if all three *Gingles* factors are met.

4 In fact, the law now is that before -- well, let me just
13:11:50 5 back up here. Before we get to strict scrutiny, we want to
6 establish first of all that what we have with the 2021 plan is,
7 in fact, a racial gerrymander.

8 So there's no dispute among the parties that the 2021 plan
9 perpetuates the 1992 majority-black district in CD 7.

10 13:12:19 And the fact that it was drawn color blind allegedly by
11 Mr. Hinaman by not looking at racial figures does not undermine
12 the fact that it's carrying forward the intentional separation
13 of voters based on their race that was started in 1992. That's
14 *North Carolina vs. Covington* at page 2553.

15 13:12:48 So it is a gerrymander, and the question is based on race,
16 and the question is whether the 2021 plan can survive strict
17 scrutiny.

18 JUDGE MARCUS: Can I stop you at this point,
19 Mr. Blacksher?

20 13:13:05 MR. BLACKSHER: Yes, sir.

21 JUDGE MARCUS: If I heard you right in response to my
22 question, when the plan was adopted in '92, drawing District 7
23 the way it does, adopted by a three-judge district court, and
24 summarily affirmed by the Supreme Court of the United States
13:13:27 25 thereafter, that plan was not unconstitutional, it did not

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1 constitute a racial gerrymander. Do I have that right?

2 MR. BLACKSHER: Not at that time. That's correct.

3 JUDGE MARCUS: So there came a point in time when it
4 became unconstitutional, violated equal protection of laws
13:13:52 5 because it was a racial gerrymander. My question to you is:
6 When did it come to be unconstitutional -- when the Supreme
7 Court decided *Shaw*, or when they decided *Barlett v. Strickland*,
8 or when the plan was redrawn in 2000, or when the plan was
9 redrawn in 2010, or when the plan was redrawn in 2020? I'm
13:14:20 10 just trying to get my arms around how what started out
11 constitutional morphed into an unconstitutional racial
12 gerrymander. Was it the Supreme Court opinion in *Shaw* that did
13 it, or were there additional changes in circumstances on the
14 ground? When did it become unconstitutional to carry that
13:14:46 15 forward?

16 MR. BLACKSHER: It should have been or could have been
17 challenged as constitutional after 1993 *Shaw v. Reno*, and
18 *Miller vs. Johnson*. But it was never examined. That is, the
19 question of whether the *Shaw* jurisprudence had rendered the
13:15:08 20 racial gerrymander approved in 1992 was still in compliance
21 with the Equal Protection Clause. That question was not
22 examined in the Section 5 process.

23 The Justice Department preclearances simply looked at the
24 question of retrogression.

13:15:28 25 No one raised the issue of whether the *Shaw* jurisprudence

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1 now placed that plan in constitutional question.

2 JUDGE MARCUS: So if I have the answer, your answer to
3 my question correct, once *Shaw* was decided, and thereafter each
4 of the iterations in 2000, 2010, and '21 were unconstitutional
13:15:57 5 racial gerrymandering, they just didn't get challenged until
6 you challenged it in this suit. Do I have that right?

7 MR. BLACKSHER: Almost. I can't say that they were
8 unconstitutional without having examined whether they could
9 have been justified by a narrowly-tailored compelling
13:16:17 10 objective. That's another -- that's the next step.

11 JUDGE MARCUS: Okay. So at least by this point, by
12 the time they drew HB-1 in '21, it was a racially gerrymandered
13 map in violation of equal protection. That's your position,
14 correct?

13:16:35 15 MR. BLACKSHER: Yes, Your Honor.

16 JUDGE MARCUS: Okay. Thank you.

17 MR. BLACKSHER: In which event, it should be subjected
18 to strict scrutiny. And as the Court knows, in *Cooper vs.*
19 *Harris*, and *Abbot vs. Perez*, the Supreme Court held that for
13:16:58 20 compliance with Section 2 to be a compelling state interest,
21 there must be a, quote, meaningful legislative inquiry into
22 whether a district drawn without regard to race would run afoul
23 of Section 2, and that just assuming that Section 2 requires a
24 minority majority district isn't enough.

13:17:21 25 But that is, in fact, what happened. The state never did

1 a meaningful inquiry into whether Section 2 of the Voting
2 Rights Act still justifies perpetuating the 1992 gerrymander.

3 In fact, counsel for the reapportionment committee advised
4 the leadership that merely because it still contained a
13:17:48 5 54 percent black majority, the Voting Rights Act was complied
6 with. But as we know under *Cooper v. Harris*, *Abbott vs. Perez*,
7 and earlier cases for that matter in the *Shaw* jurisprudence, it
8 is not enough simply to look at whether or not there's a
9 majority like district. The question is whether it was
13:18:12 10 necessary, because all three of the *Gingles* conditions were
11 present, not just the ability of a compact majority-black
12 district to be drawn, but whether or not there was
13 racially-polarized voting sufficient so that the white majority
14 usually could be counted on to defeat the choice of black
13:18:41 15 voters.

16 That question was never examined in this case. Even
17 though even that on September 27th, the Singleton plaintiffs
18 filed their complaint and spelled out this line of cases under
19 the *Shaw* jurisprudence demonstrated that by eliminating the
13:19:04 20 gerrymander, namely, making whole those counties that were
21 split, there appear two districts in which blacks can elect
22 candidates of their choice even though neither of those
23 districts has a black-voter majority.

24 Nevertheless, the leadership under the advice of counsel,
13:19:31 25 I think, simply refused to consider that argument, and that's

1 why we are here.

2 So no one disputes in this case -- we have no evidence
3 that -- and I don't think any of the parties have disputed that
4 District 6 and 7 in the whole county plan that was contained
13:19:58 5 and is still contained in the Singleton complaint performed as
6 opportunity districts for black voters, namely, all you have to
7 do -- this is not a case where you have to examine
8 racially-polarized voting. You don't have to identify what
9 constituted black person or not a black person. You don't have
13:20:22 10 to do algorithms. All you have to do is look at the election
11 returns, which is what Professor Davis did. And they show
12 clearly 55, 56 percent majorities for the Democratic candidates
13 in those two districts based on the election returns, and
14 there's no dispute in this case that black voters in Alabama,
13:20:55 15 over 90 percent, support the candidates who are Democratic.

16 So it is the Singleton plaintiffs' contention that because
17 there are without -- without having to persist and perpetuate
18 that 1992 racial gerrymander, by going back to whole counties,
19 which is what the state had been using before the 1992
13:21:31 20 gerrymander, it becomes apparent that Section 2 of the Voting
21 Rights Act can be complied with, and, therefore, any effort to
22 violate traditional districting principles by splitting county
23 boundaries in order to reach a black majority is an unjustified
24 and unconstitutional racial gerrymander.

13:22:01 25 For us, the question for this Court is what is the remedy,

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1 what should have the Legislature have done, what should this
2 Court do? And we think that *Abrams vs. Johnson* the 1997
3 decision, provides the best guidance. It says, of course, that
4 the remedy should use traditional districting principles. That
13:22:26 5 was the case you recall where a three-judge district court in
6 Georgia had to draw a congressional plan because a Legislature
7 had failed to do so.

8 *Abrams* says that the Court should give no deference to the
9 gerrymandered plan. And *Abrams* says whole counties should be
13:22:46 10 used as building blocks.

11 In fact, in *Wesch v. Hunt* in 1992, the opinion quoted the
12 guidelines that were in place that were put in place by the
13 1991 reapportionment committee that said that counties -- and I
14 am quoting now -- counties should be used as district building
13:23:08 15 blocks where possible.

16 So the state's expert demographer, Tom Bryan, demonstrated
17 by his examples, first of all, that you can't draw a
18 majority-black district simply using whole counties to -- I
19 think what Mr. Bryan demonstrates is that the Singleton plan
13:23:53 20 comes closest to achieving the smallest practicable equal
21 population among districts using whole counties. And,
22 therefore, it should be the plan that any remedy should start
23 with. And I will stop there.

24 JUDGE MARCUS: Thank you. And so we're clear, you
13:24:13 25 have reserved five minutes for rebuttal, Mr. Blacksher.

1 All right. We will proceed with -- are we going next with
2 Caster?

3 MS. KHANNA: Yes, Your Honor. Thank you.

4 JUDGE MARCUS: All right. Thank you. And you may
13:24:26 5 proceed.

6 MS. KHANNA: Thank you, Your Honor, and I would also
7 like to reserve five minutes for rebuttal.

8 I wanted to -- the Court has heard a lot of testimony and
9 received a lot of evidence in three different cases on a very
13:24:40 10 condensed time frame. And I understand that sifting through
11 the record probably feels like a Herculean task at this point.
12 So I want to use my time today to simplify the issues and cut
13 right to the heart of the matter, because at the end of the
14 day, plaintiffs' claim under Section 2 of the Voting Rights Act
13:24:59 15 is straightforward, largely undisputed, and compels just one
16 outcome.

17 Section 2 prohibits congressional maps that dilute
18 minority votes. It doesn't matter why that dilution occurs,
19 whether it was intentional or inadvertent, only that it does
13:25:18 20 occur.

21 Dilution of black-voting strength might result from
22 limiting black voters opportunity to elect to a single
23 district, or from dispersing black voters across districts,
24 where their voices are drowned out.

13:25:33 25 The question before this Court is whether as a result of

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1 the 2021 congressional plan, black-voting strength in Alabama
2 is unlawfully confined to a single district, 14 percent of the
3 state's congressional delegation, in a state where black
4 residents comprise over a quarter of the population.

13:25:53 5 Here, Your Honor, both the law and the evidence make clear
6 that the answer to that question is a resounding yes.

7 In *Thornburg vs. Gingles*, the Supreme Court set out three
8 evidentiary preconditions for claims brought under Section 2.
9 This Court would be hard pressed to find another case that so
13:26:14 10 readily illustrates each one.

11 First, plaintiffs must establish that black voters in
12 Alabama are sufficiently numerous and geographically compact to
13 form a majority of the Voting Age Population in a second
14 congressional district.

13:26:29 15 Here, plaintiffs' expert demographer, William Cooper, has
16 produced not one, but seven such plans. Defendants suggest
17 that Mr. Cooper's illustrative districts count individuals who
18 did not fit their preferred definition of black. But that
19 argument is both incorrect and ultimately irrelevant.

13:26:51 20 As a legal matter, the Supreme Court instructed in *Georgia*
21 *v. Ashcroft* that when examining vote dilution of a single
22 racial group as we are here, courts should look at all
23 individuals who identify themselves as black.

24 The principled matter, when Alabama citizens self identify
13:27:09 25 as black on the census, the state should not be in the business

1 of telling them that they're wrong, or deciding that who is
2 sufficiently black to warrant the protection of federal law.

3 But as a practical matter, this debate is immaterial to
4 plaintiffs' claim. Whether you count the any-part black
13:27:27 5 population, the black registered voter population, or even just
6 the single-race non-Hispanic black citizens of voting age, all
7 of Mr. Cooper's illustrative plans contain two majority-black
8 districts.

9 In short, plaintiffs satisfaction of the numerosity
13:27:46 10 requirement of *Gingles I* is beyond dispute.

11 The compactness element of *Gingles I* meanwhile is
12 satisfied when plaintiffs' proposed majority-minority districts
13 are consistent with traditional districting principles. As
14 Mr. Cooper has testified, each of the Caster plaintiffs'
13:28:06 15 illustrative plans maintains population equality, includes
16 contiguous districts, have compactness scores comparable to the
17 enacted congressional plan and other Alabama statewide plans,
18 splits the same number or fewer political subdivision
19 boundaries as the enacted plan, minimizes pairing of
13:28:29 20 incumbents, and complies with the principles of non-dilution of
21 minority voting strength.

22 Defendants offer very little to dispute these facts. In
23 fact, Mr. Bryan did not even evaluate Mr. Cooper's plans on the
24 vast majority of these principles because he recognized that
13:28:48 25 they had all been satisfied.

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1 So instead, he and the state emphasized a handful of them.
2 Core retention. Mr. -- defendants and Mr. Bryan fault
3 plaintiffs for failing to maintain the status quo in their
4 illustrative plans. But, of course, that is precisely what
13:29:07 5 this case challenges, the status quo for Alabama's
6 congressional plan that dilutes the voting strength of black
7 voters.

8 Defendants next turn to incumbency protection suggesting
9 that Section 2 cannot interfere with the chosen residences of
13:29:23 10 existing members of Congress, but Mr. Cooper's Illustrative
11 Plan 5 pairs no incumbents at all. And all of his remaining
12 plans pair only two incumbents, both of whom have served in
13 office for one year, undermining Mr. Bryan's apparent personal
14 preference for continuity of representation above all else.

13:29:47 15 Defendants' last resort in attempting to upend plaintiffs
16 showing under *Gingles I* is to focus on communities of interest.
17 And, in fact, just one community of interest on which the bulk
18 of their case appears to rest, that's between Mobile and
19 Baldwin counties.

13:30:04 20 But as the evidence demonstrates, defendants' argument on
21 this point fails at every level.

22 First, under the reapportionment committee's own
23 guidelines, communities of interest like the other principles
24 the defendants highlight comes toward the end of a long list of
13:30:21 25 factors to be considered in drawing a redistricting plan.

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1 And it certainly comes well after compliance with the
2 Voting Rights Act.

3 JUDGE MARCUS: Wouldn't it be true to say more
4 accurately, Ms. Khanna, that communities of interest are often
13:30:42 5 discussed, conceptualized, and considered along with
6 compactness, geographic compactness?

7 MS. KHANNA: I do believe --

8 JUDGE MARCUS: If one's heads on the coin, and the
9 other tails on the same coin?

13:30:59 10 MS. KHANNA: I'm not sure if I would quite
11 characterize that way, but I completely agree, Your Honor, when
12 discussing the compactness under *Gingles I*, the Court doesn't
13 look at the number, the Reock score. It looks at whether these
14 districts makes sense, and whether they make sense is a
15 question that involves, well, what are the boundaries of it?
16 Are they generally keeping together political subdivision
17 boundaries? Do they encompass a community of interest, or are
18 they kind of randomly picking and choosing from disparate
19 portions of the state.

13:31:28 20 I agree it's part of the inquiry. But it certainly is on
21 the Alabama redistricting criteria not something that on its
22 own can subordinate the very important criteria of complying
23 with the Voting Rights Act. So it's a little bit of -- it
24 certainly is something to be considered, but it is not
13:31:49 25 something that can outweigh the question and --

1 JUDGE MARCUS: I wasn't so much asking you to put a
2 weight on each -- as I was suggesting that when you ask about
3 the question of reasonable compactness, it's often considered
4 in tandem with communities of interest. You would agree with
13:32:11 5 that, would you not?

6 MS. KHANNA: Yes, Your Honor. Under *Davis v. Chiles*
7 in the Eleventh Circuit, the question of reasonable compactness
8 is whether or not the maps are drawn consistent with
9 traditional districting principles. And communities of
13:32:23 10 interest is one of those traditional districting principles.

11 JUDGE MARCUS: I reference it because if you look at
12 Justice Kennedy's opinion, in *LULAC*, it's clear that when he's
13 talking about reasonable compactness, in the very same
14 discussion, he reviews the problem of community of interest and
13:32:46 15 suggests that part of the problem with how one of those
16 districts was drawn was that not only were they disparate in
17 terms of geography, but communities of interest were equally
18 separated. I am suggesting the two frequently come together in
19 the analysis. Is that a fair way to look at this?

13:33:11 20 MS. KHANNA: Yes, Your Honor. I think communities of
21 interest like many of the other factors we have discussed are
22 one of the traditional districting criteria that courts look at
23 when evaluating compactness under *Gingles I*, and my
24 understanding of the *LULAC* opinion is it was informative, that
13:33:27 25 there wasn't really any evidence. That there was a community

1 of interest if this district was trying to encompass other than
2 just sheer -- merely trying to get wrangle up a bunch of
3 minorities in different pockets of the state. That's certainly
4 not what we have here.

13:33:40 5 And, indeed, the Alabama criteria make clear that -- or
6 rather the guidelines made clear that if there's ever a
7 conflict between complying with the Voting Rights Act and
8 communities of interest, core preservation, incumbency
9 protection, those principles should give way to the broader
13:33:57 10 principle of complying with minority voter rights.

11 JUDGE MARCUS: I have it. You were talking about when
12 I interrupted you the community of interest proffer combining
13 Mobile County and Baldwin County in the same district.

14 MS. KHANNA: Yes, Your Honor. And I would also -- in
13:34:17 15 addition to the guidelines on this point, the Caster plaintiffs
16 have offered reams of evidence and testimony about the shared
17 communities of interest between Mobile and Montgomery,
18 particularly for black residents who face many of the same
19 challenges in education, employment, criminal justice reform in
13:34:34 20 both areas.

21 Plaintiffs have offered the *Chestnut* trial testimony of
22 witnesses like former State Senator Hank Sanders and former
23 State Representative John Knight who explain that the urban
24 center of Mobile shares more in common with the urban center of
13:34:50 25 Montgomery with economically and culturally than suburban

1 Baldwin County. Community organizer Karen Jones, precisely the
2 sort of person that Mr. Bryan testified is best situated to
3 provide testimony on communities of interest further confirm
4 this fact.

13:35:05 5 But plaintiffs do not need to disprove that a community of
6 interest exists in the areas that defendants emphasize. At the
7 very least, the evidence indicate that there are divergent
8 views in Alabama -- how voters in Alabama view their
9 communities, which only exemplify the fact that communities of
13:35:25 10 interest across the state can overlap and sometimes conflict
11 with one another.

12 There's nothing sacred about the one community of interest
13 that defendants choose to focus on. Indeed, defendants'
14 suggestion that the Gulf Coast counties comprise an invaluable
13:35:45 15 community of interest is directly undermined by the State's
16 Board of Education plan which splits Mobile County the same way
17 plaintiffs propose here and yet was governed by the very same
18 criteria as the congressional plan.

19 Defendants may not like plaintiffs' illustrative plans as
13:36:02 20 a policy matter. But Legislature may choose to prioritize
21 different communities in the map drawing process and will
22 likely have an opportunity to do so if this Court enjoins the
23 current map.

24 But the state's policy preference as to which communities
13:36:18 25 merit representation and which do not has no bearing on

1 plaintiffs' showing under *Gingles I*. Plaintiffs' illustrative
2 maps are just that, illustrative. We are not asking the Court
3 to order that one of them be selected or adopted. The only
4 question is whether a second majority-black district is
13:36:35 5 feasible, consistent with traditional districting principles,
6 and plainly it is.

7 Plaintiffs have proved there are many ways to draw such a
8 district in Alabama while balancing a variety of all the
9 different redistricting principles, including but not limited
13:36:49 10 to avoiding minority vote dilution.

11 The second and third *Gingles* preconditions are simply
12 beyond dispute. Defendants have presented no evidence
13 contradicting plaintiffs' racially-polarized voting experts,
14 both Dr. Palmer and Dr. Liu. Between those two experts, they
13:37:07 15 examined 30 elections between 2008 and 2020. And they found
16 racially-polarized voting in every single one.

17 That result held whether examining the single-race black
18 population, or the any-part black population.

19 In fact, the state's own expert, Dr. Hood, conducted a
13:37:24 20 racially-polarized voting analysis for some of the same
21 geographical areas and elections as plaintiffs' experts, and
22 found the same extremely high levels of racially-polarized
23 voting.

24 On *Gingles III*, Dr. Palmer and Dr. Liu provided unrefuted
13:37:39 25 testimony that not only does the white majority usually defeat

1 black-preferred candidates in both congressional and statewide
2 elections, it always defeats those candidates in every district
3 except for Congressional District 7, the state's one
4 majority-black district.

13:37:54 5 The evidence thus establishes that each of the three
6 *Gingles* preconditions is easily satisfied. The Eleventh
7 Circuit has said in Fayette County that it will be only the
8 very unusual case in which the plaintiffs had kind of
9 established the existence of the three *Gingles* preconditions,
10 but still had failed to establish a violation of Section 2
11 under the totality of circumstances.

12 We submit, Your Honor, that this is not an unusual case.
13 To the contrary, it is a textbook case. All of the relevant
14 Senate Factors weigh in favor of a finding of vote dilution, in
15 many cases, based on undisputed and objective facts.

16 Let's begin with the sheer numbers. While the state is
17 correct that the Voting Rights Act does not mandate
18 proportionality, the Supreme Court has held this factor is
19 relevant in the totality of circumstances analysis. And here
20 the disparities between the black and white populations and
21 their share of congressional districts are glaring.

22 Black residents make up over 27 percent of Alabama's
23 population. But they are a majority of voters in just
24 14 percent of its congressional districts.

13:39:03 25 White residents make up 63 percent of the population. But

1 they are a majority of voters in over 85 percent of the
2 congressional districts.

3 Just 30 percent of the black population lives in a strict
4 where they have an opportunity to elect their preferred
13:39:20 5 candidates. By contrast, 92 percent of white residents reside
6 in a district where they can elect their preferred candidates.

7 And if Alabama were to draw an additional black-majority
8 district, black representation would be approximately
9 proportional to the black share of the population. While
13:39:38 10 whites would still have a greater share of congressional
11 districts than their share of the population by nearly 10
12 percentage points.

13 The Senate Factors tell the compelling story behind these
14 numbers. Senate Factor 1 examines Alabama's history of
13:39:53 15 official discrimination. Any student of American history knows
16 that state-sponsored discrimination as denied the franchise to
17 black citizens since the early 20th Century and before.

18 Dr. King surveyed Alabama's history of poll taxes,
19 literacy tests, white primaries, and the brutal violence that
13:40:12 20 confronted black residents who were brave enough to attempt to
21 cast a ballot.

22 And while those specific tools are no longer in place for
23 sure, racial discrimination in voting is unfortunately not just
24 a thing of the past. Only a few years ago, the U.S. Department
13:40:28 25 of Transportation had to intervene after the Governor made it

1 harder for black voters to comply with the state's voter ID law
2 by closing motor vehicle locations in disproportionately black
3 areas.

4 And just this decade, a federal judge lamented that
13:40:43 5 Alabama remains vulnerable to politicians setting an agenda
6 that exploits racial differences and that political exclusion
7 through racism remains a real and enduring problem in the
8 state. That was in *U.S. vs. McGregor*.

9 Senate Factor 2 examines the extent to which voting is
13:41:03 10 racially polarized in the region. Dr. Palmer demonstrated that
11 voting in the region is not only racially polarized, it's
12 significantly so with over 92 percent of blacks voting for
13 their preferred candidates while nearly 85 percent of white
14 voters voting for the opposing candidates.

13:41:19 15 Now, the state contends that this undisputed evidence of
16 racially-polarized voting is merely reflective of partisan
17 interests that just so happened to fall on racial lines. But
18 both the Supreme Court and the Eleventh Circuit have held that
19 Section 2 plaintiffs do not have to prove that racial
13:41:36 20 polarization is driven by biracial animus.

21 Even if the reasons why black and white voters are
22 polarized were relevant under Section 2, the burden would be on
23 defendants to affirmatively prove under the totality of the
24 circumstances that race is not one of those reasons.

13:41:56 25 The record here cannot support such a conclusion. The

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1 state's own expert, Dr. Hood, has expressly agreed both in his
2 published work and on the witness stand that race remains very
3 much a part of the calculus for voters today, even if it is not
4 the sole factor in voter traces.

13:42:12 5 Senate Factor 3 asks whether Alabama has used voting
6 practices that enhance the opportunity for discrimination such
7 as at-large elections, majority vote requirements, anti-single
8 shot provisions, and Alabama has checked all of those boxes.

9 Senate Factor 5 examines the extent to which
13:42:30 10 African-Americans in Alabama bear the effects of discrimination
11 in areas such as education, employment, and health, which
12 hinder their ability to participate effectively in the
13 political process.

14 It should come as no surprise that the vestiges of
13:42:45 15 discrimination continue to plague blacks in Alabama on
16 virtually every dimension as shown by Mr. Cooper, Mr. Jones,
17 Dr. King, and Dr. Caster, and is echoed in the testimony in
18 *Chestnut* by Dr. McCrary, Senator Sanders, Representative
19 Knight, Commissioner Tyson, Karen Jones, and Lakeisha Chestnut
13:43:04 20 herself.

21 This evidence confirms what we all know: Because black
22 Alabamians have less flexible work schedules, less access to
23 affordable type child care, fewer educational opportunities,
24 and unstable housing arrangements, it is harder for them to
13:43:19 25 access and navigate the voting process.

1 Senate Factor 6 asks whether Alabama's elections have been
2 characterized by overt or subtle racial appeals, and they have
3 been. Dr. Bagley noted several examples such as politicians
4 running ads saying that white men are blamed for everyone
13:43:38 5 else's problems. Dr. King's report similarly surveys the
6 various ways that Alabama politicians have recently used race
7 to negatively stereotype minorities and prey upon the fears of
8 white voters.

9 Senate Factor 7, the extent to which the minority group
13:43:53 10 members have been elected to public office weighs decidedly in
11 favor of plaintiffs' claim.

12 Alabama's congressional delegation has never included more
13 than a single black representative, and then too from the
14 state's one majority-black district.

13:44:09 15 And the absence of a single black statewide elected
16 official in the last quarter of a century is glaring in a state
17 with such a large black population.

18 Senate Factor 8, Alabama's nonresponsiveness to the needs
19 of black voters is readily proved by the number of issues that
13:44:29 20 the state has not addressed. Refusing to expand Medicaid under
21 the Affordable Care Act, which would disproportionately help
22 uninsured black Alabamians of all ages, ignoring environmental
23 pollution that black Alabamians in Lowndes County and the Gulf
24 Coast experience. These realities demonstrate the state's
13:44:50 25 disinterest in solving the problems that have a

1 disproportionate and grave effect on black Alabamians.

2 As for Senate Factor 9, the tenuousness of the state's
3 justifications for the enacted map, it is telling that all of
4 the justifications provided by defendants and the witnesses in
13:45:09 5 this case flatly ignore the prioritization of criteria in the
6 state's very own guidelines.

7 Ultimately, in evaluating the totality of the
8 circumstances under the Senate Factors, this Court need not
9 equate racial differences and disparities with racism.

13:45:29 10 Rather, this Court can review the -- former Senator
11 Sanders' testimony in *Chestnut* side by side with former
12 Congressman Byrne's testimony. And it will see are two very
13 different political realities. From Senator Sanders'
14 perspective, race has defined not only his childhood growing up
13:45:51 15 in Alabama, but also his present reality, his right to vote,
16 his personal experiences in education, criminal justice, and
17 the sting that he feels from Confederate monuments, and his
18 continued fight for equality in all aspects of his
19 professional, political, and civic life.

13:46:10 20 From Congressman Byrne's perspective, race has not been a
21 salient issue. He didn't know the black composition of his
22 district when he was in office. He doesn't notice Confederate
23 flags and monuments in the halls of Alabama's government. He
24 does not -- he's not confronted on a daily basis with the stark
13:46:28 25 socioeconomic disparities between black and white communities

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1 in Alabama.

2 THE COURTROOM DEPUTY CLERK: Ms. Khanna, you have
3 5 minutes of your 25.

4 MS. KHANNA: Thank you.

13:46:38 5 Your Honor, this Court does not have to disbelieve either
6 of these two gentlemen. Both of them, long-time, hard-working
7 representatives of Alabama's residents to see that the reality
8 in life of life in Alabama for blacks is just different than
9 the reality of life in Alabama for whites.

13:46:55 10 It should come as no surprise that many well-intentioned
11 white representatives believe that the Voting Rights Act has
12 done its job and solved the problem of racial inequity to
13 access to the franchise, while many black representatives
14 believe that the struggle for racial equality in voting and so
15 many other areas is an ongoing battle they continue to fight
16 every day.

17 Your Honor, I reserve the balance of my time for rebuttal.

18 JUDGE MARCUS: Let me ask you a question, Ms. Khanna.
19 And you are on our time, not yours.

13:47:26 20 MS. KHANNA: Okay.

21 JUDGE MARCUS: One of the arguments the state has
22 made, and it has been explained by some witnesses, including
23 Mr. Byrne, former Congressman Byrne this morning, is that even
24 assuming arguendo you were right about Section 2 and that you
13:47:53 25 could draw two majority-minority districts that were reasonably

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1 compact and otherwise complied with *Gingles II* and *III* and that
2 the Senate Factors in the aggregate tilted in your favor, even
3 if assuming all of that is true, that it is late in the day and
4 the Court sitting in equity as this Court is doing would have
13:48:18 5 to and must take into account the timing, the closeness of the
6 primary, which is scheduled for late May, I think it was the
7 24th, and the election, which is about ten months off, and the
8 argument they make, simply put, is it's too late in the day to
9 be fussing with new maps. Even if everything you say is true,
13:48:48 10 they dispute that, but they say even assuming it were so, it's
11 too late in the day.

12 What's your answer?

13 MS. KHANNA: Your Honor, I think that's just wrong.
14 The fact is this is not the -- we are not in a last minute
13:49:04 15 before the election moment right now. We are a full four --
16 more than four months away from the primary election. There's
17 a congressional filing deadline coming up.

18 JUDGE MARCUS: Let me stop you. The primary election
19 is 24 May. Do I have that right?

13:49:19 20 MS. KHANNA: I believe that's right.

21 JUDGE MARCUS: So we are about four-and-a-half months
22 from then.

23 MS. KHANNA: Exactly. And while Alabama has imposed a
24 congressional filing deadline for the end of January, that is
13:49:31 25 perhaps one of the longest spans between a congressional filing

1 deadline and the congressional primary that I am aware of in
2 the country and is certainly not at all necessary.

3 If this Court were to find that plaintiffs have
4 established a sufficient likelihood of success on the merits
13:49:48 5 and that the plan should be enjoined, it would have maximum
6 flexibility to postpone that filing deadline, give the
7 Legislature an opportunity to adopt a remedy, have a
8 court-imposed remedy, whatever the remedial process will be,
9 there will be ample time for candidates to file and to not have
13:50:06 10 to touch the election deadlines at all. The primary would stay
11 in place.

12 You know, there are a lot of redistricting and voting
13 rights cases litigated across the country in election years.
14 And when people talk about the eve of an election or what's
13:50:21 15 coming at the last minute, they do not mean four months before
16 a relevant election. They're talking weeks at that point. And
17 here, the Court has just ample discretion and ample amount of
18 time to not disrupt anything in the election calendar, but
19 still achieve or recognize the Voting Rights Act violation
13:50:42 20 that's in the enacted plan and alleviate plaintiffs of the
21 injury that they're bound to suffer from any election that's
22 going to be held under that map.

23 JUDGE MARCUS: Let me ask a final question. It's
24 something you touched on already, and all of the parties have,
13:50:59 25 and that is weighing the various and sometimes competing

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1 communities of interest.

2 In this case, we have heard substantial evidence of -- at
3 least two communities of interest, one shaped by the Black Belt
4 and environs, the second shaped by the Gulf Coast -- Baldwin
13:51:21 5 and Mobile counties. And it's been pointed out to us that
6 those communities of interest in some ways are overlapping, and
7 in some ways are competing with each other.

8 How does a court in your view go about weighing, if we
9 have to weigh at all, the relevant strengths of these competing
13:51:48 10 communities of interest?

11 MS. KHANNA: I don't think that the Court has to
12 decide that one community of interest trumps another.

13 Communities of interest, the definition provided by
14 Alabama and hosts of other states, is purposefully vague and
13:52:05 15 can mean a lot of different things to a lot of different
16 people. And I don't think there's any objective standard by
17 which to say this community of interest is more important than
18 this community of interest. We all belong to different
19 communities, all of which have different importance to
13:52:21 20 different people.

21 I think that the question for the Court is whether or not
22 -- the only question for the Court is whether or not plaintiffs
23 have satisfied their burden to show that a second
24 majority-black district can be drawn consistent with
13:52:34 25 traditional districting principles, including communities of

1 interest.

2 And where plaintiffs have established sensible districts
3 that meet a host of traditional districting criteria and
4 supported those with the testimony from community members
13:52:49 5 explaining how they view their communities to comport with
6 those districts, I believe that's all that is required to
7 satisfy *Gingles I*.

8 If there are policy preferences about, well, I think we
9 want to prioritize community over that community for this
13:53:05 10 reason or that reason, I believe those policy preferences are
11 not for this Court to make and not -- and certainly are up to
12 the Legislature to make in adopting a remedy plan. But they
13 have to do so consistent with the Voting Rights Act.

14 It cannot be the case that because the people in power
13:53:22 15 have a preference for some communities of interest that they
16 claim is most important and inviable contrary to their own
17 guidelines, contrary to their board of election plan, that
18 everything else falls away. We cannot have a second
19 majority-black district because these two areas really, really
13:53:41 20 want to stay together. I think is important to stay together.

21 There are a lot of competing factors here. But minority
22 voting rights cannot be relegated to the bottom of that
23 consideration, and if anything, need to be weighted at the very
24 top, and as long as we have shown which I believe we have that
13:53:57 25 communities of interest can -- are consistent in -- with those

1 districts, I believe we satisfied *Gingles I*.

2 JUDGE MARCUS: All right. Thank you. And you have
3 reserved your five minutes for rebuttal. We will turn to
4 Mr. Ross.

13:54:12 5 JUDGE MANASCO: Judge Marcus, I have a question for
6 Ms. Khanna. Ms. Khanna, I want to make sure that there's one
7 precise detail that I understand about the Caster plaintiffs'
8 request for relief. To the Caster plaintiffs, is there a
9 difference, and if there is, please comment on it for me,
13:54:31 10 between an injunction that expresses a ruling that there have
11 to be two districts in which black Alabamians have an
12 opportunity to elect a representative of their choice, and an
13 injunction that expresses ruling that there have to be two
14 majority-black districts?

13:54:51 15 MS. KHANNA: I --

16 JUDGE MANASCO: Feel free to postpone the answer to
17 the question until the post hearing submissions. I'm genuinely
18 not trying to put anybody on the spot. I just need to fully
19 understand the difference, if there is one.

13:55:06 20 MS. KHANNA: No. I think it's a very important
21 question, Your Honor, and it really does pinpoint kind of the
22 nub of the issue of the difference between plaintiffs' standard
23 to liability and what exactly is the proper remedy, right? So
24 there's no question that in order to show liability under
13:55:22 25 Section 2, we need to establish that it's possible to create a

1 majority-minority district over 50 percent, which I believe we
2 have done in states.

3 On the question of remedy, I actually believe as a
4 matter of law that there are multiple ways to remedy a Section
13:55:37 5 violation, and that they do not have to be hinged to that

6 Bartlett standard for proving liability. I think we have seen
7 it in other states like Texas, which in areas where the courts
8 has fully agreed that there's no question of the Voting Rights
9 Act applies, no question Section 2 applies where you can draw

13:55:54 10 50-plus districts either for black residents or Latino

11 residents. But where the ultimate remedy has been a 49 percent
12 district or a 48 percent district, that the Court feels is --
13 has sufficiently provided black voters an opportunity to elect
14 their preferred candidates. I believe there is a little bit
13:56:11 15 more flexibility on the remedy than there is on the liability.

16 But I do believe that making sure -- making clear that the
17 Voting Rights Act requires two districts in which black voters
18 have an opportunity to elect their preferred candidates is
19 really important to guide whatever remedy that is. I would

13:56:28 20 also say the evidence here -- I don't have -- I don't have an
21 answer off the cuff about what exactly is the best percentage
22 for such a second district or the right percentage, but I will
23 say that the racially-polarized voting evidence here does
24 indicate that it's very hard for black voters in Alabama to get
13:56:46 25 an opportunity to elect unless and until they are a majority of

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1 the eligible voters.

2 JUDGE MANASCO: Thank you.

3 JUDGE MARCUS: I am still not sure, Ms. Khanna, that I
4 understand the answer to that question. So let me come at it
13:57:02 5 one more time.

6 You say, and I think it's clear that for purposes of
7 Section 2 under the Voting Rights Act, you have to establish
8 first as an evidential matter the circumstances surrounding
9 *Gingles I*. That requires you to prove that you can establish
13:57:28 10 on the record two majority-minority districts. It's not enough
11 simply to say you can create two opportunity districts. That
12 wouldn't get you to home plate with regard to establishing a
13 *Gingles* Section 2 analysis. I have that correct.

14 MS. KHANNA: Absolutely. Under *Bartlett v.*
13:57:52 15 *Strickland*, we have to pass 50 percent.

16 JUDGE MARCUS: If I understand what you are asking
17 this Court to do, assuming you otherwise can circumnavigate all
18 of the circumstances in *Gingles*, not just *I* but *II* and *III*, and
19 the Senate Factors, as well, you are asking us one, to say
13:58:14 20 preliminarily that HB-1 violates the Voting Rights Act. That's
21 the first thing you are asking, correct?

22 MS. KHANNA: Yes.

23 JUDGE MARCUS: And then the second -- and this is
24 where I want to be sure I understand you with clarity -- what
13:58:35 25 would you have us say to the Legislature, if we were to

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1 otherwise agree? What is it that they have to do?

2 Do they have to draw two majority-minority districts in
3 order to comply with the Voting Rights Act? Is that what you
4 would have us tell them? Or would you have us simply say it's
13:58:57 5 enough for them to draw two opportunity districts?

6 MS. KHANNA: I will certainly try. You're right, Your
7 Honor, that the first thing we are requesting is the
8 declaratory relief that says there is a violation of Section 2.

9 The next thing we would request is an injunction that says
13:59:19 10 there cannot -- you cannot use this map in the upcoming
11 election, the enacted map.

12 The next thing after that, frankly, does not require the
13 Legislature to do anything. It would not be an injunction
14 against the Legislature to then go and come up with a different
13:59:35 15 map. It would be a chance -- the Court would need a remedy for
16 the violation. We believe there's ample time to impose a
17 remedy, and the Court could and likely should give the
18 Legislature an opportunity to develop that remedy, to develop a
19 remedy that is consistent with Section 2.

13:59:54 20 JUDGE MARCUS: All of that is clear. The question,
21 though, remains open: If you are otherwise right, and I
22 underscore if, what is it you would have us say to the
23 Legislature? This map is no good, we'd ask you to go back and
24 draw another map, and what, if anything, would you have us say
14:00:15 25 beyond the fact that this map violates Section 2 because two

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1 majority-minority districts could be drawn? Would we say
2 anything further? Ought we to in your view?

3 MS. KHANNA: Yes. I believe that the instruction
4 should be that the -- that Alabama must adopt a map, that any
14:00:34 5 map that Alabama adopts must comply with Section 2 by
6 containing two congressional districts that provide black
7 voters an opportunity to elect the preferred candidates.

8 I don't -- as a legal matter, I believe that is the --
9 that's the remedy for a Section 2 violation.

14:00:57 10 As an evidentiary matter, and as a localized matter in
11 Alabama, I believe that the evidence shows that in order to
12 have an opportunity to elect the preferred candidate, black
13 voters need to be a majority of the Voting Age Population or
14 somewhere very, very close to that, given the sheer levels of
14:01:19 15 racially-polarized voting. It would not be sufficient to call
16 a 42 percent or 38 percent district necessarily an opportunity
17 to elect district, given the evidence here.

18 So I think that while there -- while legally I think the
19 answer is Section 2 requires the creation of an additional
14:01:40 20 opportunity to elect district, practically, I think that might
21 -- that that will likely be an additional district in addition
22 to the one that currently exists that is over 50 percent Black
23 Voting Age Population or very close to that.

24 JUDGE MARCUS: Thank you very much. We will proceed
14:02:02 25 now with the argument from the Milligan plaintiffs.

1 MR. ROSS: Thank you, Your Honors. I will provide the
2 closing for the Milligan plaintiffs on our Section 2 claim. My
3 colleague Davin Rosborough will address our racial
4 gerrymandering claim. We reserve five minutes for rebuttal.

14:02:18 5 Your Honors, this lawsuit concerns two of our most
6 fundamental constitutional rights; the right to vote, and the
7 right to be free from racial discrimination.

8 This is not a new fight in Alabama. The state has an
9 undeniable history of discrimination against black voters,
14:02:30 10 including a decades' long pattern of passing discriminatory
11 redistricting plans.

12 Yet despite black voters' calls for a second
13 majority-black district, last year the Legislature ignored
14 those requests and enacted HB-1 which continues the long
14:02:46 15 pattern of discrimination. Indeed, no one disputes that black
16 people are about 27 percent of Alabama's population, but
17 because of racially-polarized voting, they can elect their
18 candidates of choice in only one of the state's seven
19 congressional districts.

14:03:02 20 And no one disputes that about one-third of black voters
21 are packed into District 7 which has an unnecessarily high
22 59 percent black registered voter population, and that HB-1
23 cracks the rest of the Black Belt across for another three
24 congressional districts preventing the creation of a second
14:03:19 25 majority-black district.

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1 As Ms. Khanna aptly explained, these facts and others
2 plainly show a violation of the Voting Rights Act.

3 Although rights involved are important, the claim is quite
4 simple. In 1982, a bipartisan Congress passed the amended
14:03:37 5 Voting Rights Act. And the Supreme Court in *Thornburg vs.*
6 *Gingles* laid out the straightforward framework for proving
7 these claims.

8 As Ms. Khanna already explained, first, black voters must
9 show that they are numerous, sufficient numerous and
14:03:53 10 geographically compact enough to constitute a majority and an
11 additional district. Second and third, they must show that
12 voting is racially polarized. Once these preconditions are
13 established, the Court must examine the totality of the
14 circumstances.

14:04:08 15 Majority of the factors do not need to point one way or
16 the other.

17 Your Honors, the overwhelming and undisputed evidence
18 shows that plaintiffs have satisfied both the *Gingles*
19 preconditions, and that under the totality of the
14:04:23 20 circumstances, HB-1 impermissibly dilutes black-voting
21 strength. With respect to the *Gingles* preconditions, the
22 Milligan plaintiffs' expert Dr. Moon Duchin and the Caster
23 plaintiffs' expert Mr. Bill Cooper offered ten illustrative
24 plans containing two majority-black districts with black
14:04:40 25 registered voter, black single-race voter, black any-part voter

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1 populations over 50 percent.

2 All of the plans are geographically compact, and the plans
3 attempt, unlike HB-1 to keep the Black Belt whole. The plans
4 also were drawn consistent with the state's own traditional
14:05:01 5 redistricting principles. This alone is sufficient to satisfy
6 *Gingles I* requirements.

7 With respect to *Gingles II* and *III*, the plaintiffs' expert
8 Dr. Baodong Liu showed that across seven congressional primary
9 and general elections from 2008 to today, black people gave an
14:05:17 10 average of 88 percent of their votes to black-preferred
11 candidates. In contrast in the same seven elections, white
12 people gave an average of 13.5 percent of their votes to the
13 black-preferred candidates.

14 Outside of the majority-black District 7, black-preferred
14:05:33 15 candidates enjoyed no electoral success at all.

16 These same pattern held in ten statewide elections. Stark
17 racially-polarized voting was apparent in both statewide
18 general and primary elections for President, U.S. Senate,
19 Lieutenant Governor, Secretary of State, and other offices.

14:05:51 20 Dr. Palmer, the Caster expert, found the same pattern of
21 RPV so too did the defendant's expert Dr. Trey Hood. Indeed,
22 Dr. Hood agreed with Dr. Liu and Dr. Palmer that voting is
23 racially polarized and that black voters cannot consistently
24 elect their candidates of choice in districts below a majority.

14:06:10 25 Your Honors, these statistics are at the heart of the

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1 Voting Rights Act case. And these statistics are unrefuted by
2 the defendants. No black person, regardless of their party or
3 qualifications, has ever won a majority white congressional
4 district in Alabama. As the Eleventh Circuit has repeatedly
14:06:30 5 stated, The surest indication of race conscious politics is a
6 pattern of racially-polarized voting.

7 Your Honor, with respect to Senate Factors, plaintiffs'
8 Mr. Evan Milligan and Captain Shalela Dowdy testified Alabama's
9 Legislature has ignored the advocacy of black community calling
14:06:50 10 for two majority-black districts, that the current plan leaves
11 black voters without responsive representation in Congress,
12 that HB-1 ignores the shared history, the shared familial and
13 cultural bonds, the shared experiences, and the shared concerns
14 about racial inequities in education, health, employment, and
14:07:11 15 other areas that establish a shared interest of communities
16 amongst black people in Montgomery County, Mobile County, and
17 across the Black Belt.

18 In addition, Dr. Bagley plaintiffs' historian confirmed
19 that the shared history of the Black Belt exists between Mobile
14:07:28 20 County.

21 He also testified that at least seven of the Senate
22 Factors support a finding of vote dilution, including Senate
23 Factor 1, the state's long and intense history of de jure and
24 de facto racial discrimination, including a 2017 opinion by
14:07:43 25 three-judge court that Alabama state legislative maps were

1 enacted with racially predominant motive, including racial
2 discrimination and redistricting in five of the six
3 redistricting cycles from 1960 to 2010, and several recent
4 court decisions finding that the state or its local
14:08:00 5 jurisdictions violated the Voting Rights Act or the
6 Constitution.

7 Your Honors, with respect to Senate Factor 5, no one can
8 dispute there's a history of discrimination in voting -- or
9 excuse me -- in education and employment, health, and every
14:08:14 10 other area of Alabama, and that stark socioeconomic disparities
11 between black and white people continue to exist.

12 Indeed, Your Honors, in the 2020 elections, black voter
13 registration and turnout rates were about 10 points below those
14 of white voters. That even ignoring this lower level of black
14:08:34 15 participation in the state, socioeconomic disparities have made
16 it much more difficult for black voters to financially
17 contribute to political campaigns or otherwise engage in
18 politics.

19 As Ms. Khanna already explained, there's been some
14:08:47 20 startling examples of racial appeals in just last ten years.
21 White congressional candidates have accused the political
22 opponents of conducting a war on whites. They have called for
23 the repeal of the Reconstruction amendments, which gave black
24 people their freedom after the Civil War. They ran campaigns
14:09:06 25 with burning images of out-of-state black Congress people, and

1 other minority members of Congress, and accused them of trying
2 to tear this country up. They used other overt and subtle
3 appealed to call for block voting. Because of block voting, no
4 black candidate has ever won an election for Congress outside
14:09:27 5 of District 7.

6 As of Senate Factor 8, the congressman who were elected
7 from the majority white districts have been unresponsive to the
8 specific needs of black voters. As we heard, these
9 congressmen, including Congressman Byrne opposed bipartisan
14:09:44 10 infrastructure laws that provided important resources to the
11 Black Belt. They have opposed the bipartisan effort to restore
12 the Voting Rights Act. And they have opposed the Medicaid
13 expansion that would allow 220,000 disproportionately black
14 voters to receive health insurance despite the fact that 39
14:10:05 15 other states have agreed to this expansion.

16 Your Honor, despite this overwhelming and largely
17 undisputed evidence, the defendants tried to make a number of
18 arguments which are irrelevant or distractions. Defendants
19 will claim that the plaintiffs' illustrative plans do not
14:10:26 20 contain true majority-black districts, but, again, under any
21 measure plaintiffs' plans have two compact majority districts
22 even using the most restrictive definition of black.

23 Defendants will claim that plaintiffs' plans do not
24 respect traditional redistricting principles, but this is
14:10:45 25 merely an attempt to graft the standards from the *Shaw* claims

1 on to Section 2.

2 The Eleventh Circuit has specifically rejected this
3 approach in *Davis vs. Chiles*.

4 Even so, Dr. Duchin and Mr. Cooper testified that
14:10:59 5 plaintiffs' plans respect the black community -- Black Belt
6 community of interest unlike HB-4. The plaintiffs' plans are
7 as compact or more compact than HB-1. The plaintiffs' plans
8 split the same or fewer counties than the six county split in
9 HB-1, that plaintiffs' plans keep the Black Belt's core in two
14:11:18 10 districts rather than four, that Dr. Duchin's plans split the
11 same or fewer majority black cities in HB-1, and that the plans
12 either do not pair incumbents or can be easily adjusted to not
13 do so.

14 Indeed, as been said many times, plaintiffs' plan looks
14:11:35 15 very similar to the Alabama State Board of Education plan. And
16 the State Board of Education plan and the congressional plan
17 were both drawn by the same Legislature pursuant to the same
18 traditional redistricting criteria.

19 Your Honors, with respect to *Gingles II* and *III*, Dr. Liu's
14:11:54 20 methodology has been questioned. Dr. Hood testified on
21 cross-examination that he used the exact same method as Dr. Liu
22 in conducting his racially-polarized voting analysis. Dr. Liu
23 also found that whether you use any-part black or single-race
24 black, voting is racially polarized, and black people prefer
14:12:15 25 the same candidates.

1 Dr. Liu also testified that the fact that he found that
2 black people, whether he used any-part black or single-race
3 black, voted for the same candidates was consistent with his
4 own research finding that black people, whether you look at
14:12:29 5 black Latinos or other people with varied racial or ethnic
6 identities tend to vote the same.

7 Defendants also allege that partisanship not racism
8 explains white block voting in Alabama. But no precedent
9 supports the state's theory the plaintiffs are required to
14:12:47 10 prove or disprove why voting is racially polarized.

11 As the Supreme Court said in *Gingles*, the difference
12 between the choices made by black and white voters is not the
13 reason -- it's the difference between the choices made by black
14 and white voters, not the reason for that difference, that
14:13:03 15 results in black voters having less opportunity and violations
16 of the Voting Rights Act.

17 Your Honors, even if this were relevant, Dr. Liu's
18 analysis showed that there was racially-polarized voting in
19 both Democratic and Republican primaries, and that strikingly
14:13:20 20 even in some general elections, majorities of white Democrats
21 voted against black Democratic candidates to support white
22 candidates.

23 Defendants will also knit pick at the totality of the
24 circumstances analysis. They have asserted that court orders
14:13:37 25 -- certain court orders do not count, but declaratory judgments

1 and consent orders, particularly those containing liability
2 findings are binding court orders like any other.

3 The state has also attempted to argue that Alabama's
4 racial disparities in employment and education are similar to
14:13:55 5 other states. But Section 2 requires an intensely local
6 analysis of the relevant facts and not a comparison among
7 states.

8 This is because as Dr. King testified, each of the states
9 Alabama references have their own terrible histories of racial
14:14:10 10 discrimination. And these states past or ongoing instances of
11 discrimination or racial disparities does not absolve Alabama
12 of its own history.

13 Defendants do not come close to over-rebutting any of
14 plaintiffs' evidence going to the totality of the
14:14:28 15 circumstances.

16 Finally, the defendants may argue that it's simply too
17 late for relief to the plaintiffs. The evidence shows that
18 this is incorrect. The Court heard how quickly HB-1 was drawn
19 and enacted. However, no one has ever voted under the maps at
14:14:47 20 issue here. There is no risk of voter confusion. As, Your
21 Honor, already said, the primary election is nearly five months
22 away. The general election is over nearly 11 months away.

23 Your Honor, the plaintiffs have met their four
24 requirements of the preliminary injunction standard. As our
14:15:09 25 proposed findings of fact and conclusions of law will show, the

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1 plaintiffs have shown a substantial likelihood of success on
2 the merits. They have shown irreparable injury in the form of
3 vote dilution as described by the Supreme Court, the Eleventh
4 Circuit, and district courts across Alabama, the equity
14:15:27 5 strongly favor plaintiffs' interest in exercising their right
6 to vote free from racially discriminatory redistricting, and
7 there is no countervailing weighty concerns the defendants have
8 identified.

9 At this stage, what we are asking the Court to do is
14:15:42 10 extend any upcoming election deadlines and give the state an
11 opportunity to devise new maps that completely cure the
12 constitutional and statutory violations.

13 In sum, this case presents the precise evil the Voting
14 Rights Act was designed to remedy, the dilution of black
14:16:00 15 voters' voting strength.

16 Federal courts, as you know, play a vital role in ensuring
17 that every citizen can participate equally in the political
18 process. And this Court has the power to order Alabama to
19 remedy the Section 2 violations here by requiring it to draw
14:16:17 20 two black districts.

21 As the Supreme Court has explained, district courts have a
22 duty to cure illegal districts -- excuse me -- districts even
23 through an orderly process in advance of elections. We simply
24 ask this Court to take up that duty.

14:16:35 25 Thank you, Your Honors.

1 JUDGE MARCUS: Thank you very much. Any questions,
2 Judge Manasco or Judge Moorer for Mr. Ross?

3 JUDGE MANASCO: I have got one. It's the same one
4 that I asked counsel for the Caster plaintiffs.

14:16:48 5 Mr. Ross, do you see a difference, and if you do, please
6 comment on it for me, between an injunction that directs the
7 use of a map that contains two districts in which black voters
8 would have an opportunity to elect a representative of their
9 choice on the one hand, and, on the other hand, an injunction
14:17:07 10 which requires the use of a map that includes two
11 majority-black districts?

12 MR. ROSS: Your Honor, we're happy to brief this in
13 our proposed findings of fact and conclusions of law, but I
14 will say that I think the answer, as Ms. Khanna said, is
14:17:23 15 complex. I think that this Court can and should issue a
16 declaratory judgment saying that the current maps violates
17 Section 2, and then give the Legislature an opportunity to draw
18 districts that cure the violation, obviously working from the
19 illustrative plans.

14:17:39 20 If the Legislature were to draw one district that looked a
21 lot like District 7 and another district that was 45 percent
22 black, or something else, then this Court would need to decide
23 with evidence or argument from the parties whether or not that
24 completely cured the violation.

14:17:57 25 And so I think my answer is simply that the Court has to

1 give -- find the Section 2 violation, give the Legislature the
2 opportunity to cure it, and whatever the Legislature comes up
3 with, whether it's a 45 percent black district and a 50 percent
4 black district, the parties will need to decide then whether or
14:18:19 5 not that cures the violation that the Court finds.

6 JUDGE MANASCO: Thank you.

7 JUDGE MARCUS: Anything further, Judge Moorer?

8 JUDGE MOORER: No, sir.

9 JUDGE MARCUS: All right. You broke up your argument
14:18:31 10 in half, Mr. Ross, and only devoted your time to Section 2. I
11 take it your colleague Mr. Rosborough is going to address the
12 constitutional claim?

13 MR. ROSS: Yes, Your Honor.

14 JUDGE MARCUS: Thank you. Mr. Rosborough.

14:18:48 15 THE CLERK: You have 10 minutes total of the 30 that
16 was given the 25 that was given.

17 MR. ROSBOROUGH: Thank you. Understood. Thank you.

18 THE COURTROOM DEPUTY CLERK: Thank you.

19 MR. ROSBOROUGH: Good afternoon, Your Honors. Davin
14:19:01 20 Rosborough for the Milligan plaintiffs.

21 My colleague, Mr. Ross, has discussed the compelling
22 evidence that HB-1 violates Section 2 of the VRA by failing to
23 create a second congressional district that will allow black
24 voters to elect candidates of their choosing.

14:19:15 25 The same packing of black voters in District 7 in

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1 unjustified numbers and simultaneously cracking of many of the
2 state's black voters among Districts 1, 2, and 3, violate the
3 Fourteenth Amendment to the Constitution as a racial
4 gerrymander.

14:19:30 5 Under HB-1, District 7's registered voter population is
6 just under 60 percent black, and the district contains about a
7 third of Alabama's black voters. In contrast, Districts 1, 2,
8 and 3 systematically fracture much of the remaining black
9 population into separate districts such that the Black Voting
14:19:52 10 Age Population in each is below 30 percent.

11 This irreparably harms voters in those districts like our
12 clients by subjecting them to unfair racial divisions.

13 Of course, we agree with the Supreme Court in *Bush v. Vera*
14 that district scrutiny does not apply merely because
14:20:07 15 redistricting is performed with consciousness of race.
16 States can and should draw black-majority districts when doing
17 so serves the state's compelling interest in complying with the
18 VRA, so long as the districts are narrowly tailored to that
19 end.

14:20:22 20 But here the Alabama Legislature took no action whatsoever
21 to narrowly tailor that use of race in District 7 to comply
22 with the VRA or any other compelling governmental interest.
23 The cracking of black voters across Districts 1, 2, and 3 shows
24 the opposite of VRA compliance. These establish a violation of
14:20:41 25 the Fourteenth Amendment.

1 There's no dispute that the current districts originate
2 from the maps drawn in 1992 arriving out of the *Wesch*
3 litigation.

4 The parties there agreed that, quote, a single member
14:20:53 5 significant majority 65 percent or more African-American
6 congressional district should be created. That district was
7 District 7.

8 Mr. Randy Hinaman was the individual who drew the
9 challenged map here, and he also drew that map adopted in '92.
14:21:08 10 He worked on the 2000-cycle maps, and he drew the 2011 maps.

11 Mr. Hinaman admitted that race played a major role in the
12 design of District 7 in 1992. Other than complying with
13 population requirements, race was his top consideration.

14 He drew District 7 in 1992 with the intent to make a
14:21:28 15 majority-black district, which he accomplished by assigning
16 counties in precincts with high concentrations of
17 African-American voters.

18 Mr. Hinaman also admits that the 2021 districts can be
19 traced back to these '92 districts with each successive map
14:21:43 20 preserving most and as much as possible those districts.

21 Representative Pringle agrees concerning District 7.

22 Even as to the 2011 plans, Secretary Merrill has stated
23 that Congressional District 7 appeared to be racially
24 gerrymandered. Mr. Hinaman agreed with his assessment.

14:22:02 25 But the plaintiffs have also presented extensive expert

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1 testimony of racial predominance. Dr. Imai's one
2 majority-minority district simulation showed that the state's
3 decision to pack a number of black voters from Montgomery
4 County into District 7 made it a racial outline.

14:22:19 5 Now, the state was considered -- entitled to consider race
6 for VRA compliance. But Dr. Imai's race blind maps rebut the
7 state's argument that race didn't play a role at all and
8 instead shows the predominant role did it play.

9 Dr. Williamson also found compelling evidence of racial
14:22:35 10 predominance with the three counties split in District 7
11 Jefferson, Montgomery, and Tuscaloosa and particularly the
12 manner of those splits.

13 Areas of those counties with higher BVAP were drawn into
14 Congressional District 7 with disproportionately white census
14:22:52 15 blocks within those counties drawn into other districts
16 creating a range of 25 to 45 disparities in those counties.

17 The racial predominance evidence in CD 7 is overwhelming
18 and unrebutted.

19 As to Districts 1, 2, and 3, the defendants correctly
14:23:07 20 contend that they've maintained the cores of these districts
21 since the '92 maps.

22 Yet in '92, the U.S. Attorney General objected to the
23 Alabama Legislature's plan, which they admit was quite similar
24 to the *Wesch* plan because it fragmented the rest of the black
14:23:24 25 population outside of District 7. The AG noted a

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1 predisposition on the part of state political leadership to
2 limit black voting potential to a single district.

3 Since then, despite black voters in these districts making
4 up around 90 percent of the Voting Age Population necessary to
14:23:42 5 form an entire congressional district, have consistently been
6 held at or below 30 percent BVAP since the '92 maps.

7 The racial heat map from defendants' own expert Mr. Bryan
8 demonstrates the way that the district boundaries slice through
9 the middle of black communities at every turn. As you can see
14:24:02 10 from the added red lines, Districts 1, 2, 3, and 7, cut
11 directly down the middle of black communities in the Black Belt
12 that are excluded from District 7.

13 Dr. Williamson's analysis confirms this racial cracking
14 isn't due to geography or other factors. He exposed that black
14:24:19 15 Alabamians are more likely to be diffused across districts in
16 the Black Belt than other regions using multiple measures of
17 analysis, and he showed that for Districts 2 and 3, counties
18 with higher black populations were more likely to border
19 another district, a hallmark of cracking.

14:24:35 20 Dr. Imai also showed likely racial predominance in
21 Districts 1, 2, and 3. Even when drawn a majority-minority
22 district and considering Mobile and Baldwin and the Black Belt
23 as communities of interest, the second highest BVAP district
24 would tend to have a BVAP in the high 30s and up to 40 percent
14:24:55 25 as opposed to the state's cracking of black voters and

1 preventing any district above 30 percent.

2 Now, Dr. Imai's report shows nothing about the validity of
3 any illustrative plans, of course, because he did not take race
4 into account at all except for one-MMD.

14:25:12 5 Even though this is perfectly admissible under the
6 Fourteenth Amendment and necessary for VRA compliance. What it
7 does show is isolating the extent of the state's use of race in
8 its maps and how it cracked the black community.

9 In response, the defendants rely on a few primary
14:25:30 10 arguments to try to avoid what the evidence shows.

11 First, they conflate the plaintiffs' racial gerrymandering
12 claim under *Shaw* with an intentional vote dilution claim to try
13 to impose a different standard of proof. But *Shaw* recognized
14 this is an analytically distinct form of claim from a vote
14:25:46 15 dilution claim. A racial gerrymandering claim doesn't require
16 an intent to disadvantage black voters, but only that the state
17 that has used race as a basis for separating voters into
18 districts as it said in *Miller*.

19 Second, defendants argued that their maps cannot be racial
14:25:57 20 gerrymanders where they prioritize preserving existing district
21 cores and ignored race while drawing the maps. But in *North*
22 *Carolina vs. Covington*, the Supreme Court explicitly rejected
23 the argument that one can avoid racial predominance by
24 readopting cores of previous districts and not looking at race
14:26:19 25 when doing so. And it explained that it didn't matter that the

1 claim arose in a challenge to remedial rather than original
2 districts.

3 The Supreme Court rejected the argument that preserving
4 cores prevented their challenge because the plaintiffs remained
14:26:34 5 segregated on the basis of race because of those lines the
6 state readopted.

7 It explained that it is the segregation of the plaintiffs,
8 not the Legislature's line drawing as such that gives rise to
9 the claims. Just because a Legislature chooses to readopt
14:26:48 10 those lines does not mean those readopted portions are not
11 relevant. The Courts in Alabama Legislative Black Caucus and
12 *Clark vs. Putnam County* found racially gerrymander districts as
13 well despite those districts preserving the cores of existing
14 districts.

14:27:03 15 Defendants were well aware of this racial history, and the
16 state even admitted that District 7 under the 2011 plan was a
17 racial gerrymander, yet they chose to largely readopt these
18 lines in HB-1.

19 Third, defendants argue that Mr. Hinaman didn't look at
14:27:17 20 race while drawing the 2021 maps. The Supreme Court in
21 *Covington* rejected the same defense. As is true here, it did
22 little to undermine the evidence concerning the shape and the
23 demographics of those districts that the districts
24 unconstitutionally sort voters on the basis of race.

14:27:34 25 Even looking only at the new district lines shows racial

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1 disparities. The only analysis of those changes in the record
2 comes from Dr. Williamson. And he showed that for Districts 2
3 and 3 black voters were moved out of those districts in much
4 higher percentages than they were moved in.

14:27:50 5 Finally, defendants cannot rebut plaintiffs' evidence of
6 racial predominance with any other factor. Given that they
7 only changed the lines a little bit, minor changes to make a
8 district more compact or respond to incumbents would not
9 predominate. Mr. Hinaman even testified in his deposition at
14:28:07 10 page 73 that requests for congressional representatives were
11 not major.

12 Finally, a state's predominant use of race does not mean
13 the map is unconstitutional. Instead, the state now carries
14 the burden to show that its separation of voters based on race
14:28:22 15 was narrowly tailored to serve the VRA, and it has not met its
16 burden here.

17 In cases where the Court has found the state met this
18 test, the state made a strong showing of pre-enactment analysis
19 would justifiable conclusions. A majority-black district is
14:28:38 20 constitutional even where race predominates so long as the
21 state had a good reason to draw it. But narrow tailoring
22 District 7 required the state to assess performance in each
23 redistricting cycle.

24 It's undisputed that the state never bothered to ask that
14:28:53 25 question or conduct any form of tailoring for District 7 here.

1 The parties agree that no racial-polarization analysis was
2 conducted for any congressional districts. And Senator
3 McClendon testified that the state did nothing to ensure that
4 the BVAPs of such districts were not too high.

14:29:11 5 If defendants had performed a racially-polarized voting
6 analysis, it would have revealed a lack of narrow tailor.

7 Dr. Liu showed the districts just above 50 percent BVAP or
8 around 53 percent of black registered voters, as proposed in
9 Plaintiffs' Exhibit 1 maps, can perform for black voters, and
14:29:30 10 the VRA offers no safe harbor for cracking black voters among
11 Congressional Districts 1, 2, and 3. Nothing in the VRA
12 requires or could require the state to keep the black
13 populations in those districts below 30 percent.

14 All of the evidence points to district lines in the
14:29:46 15 challenged districts that separate voters based on race and do
16 not do so in a narrowly tailored manner to comply with the
17 Voting Rights Act.

18 Because HB-1 violates Section 2 of the VRA and the
19 Constitution, the Court should order defendants to redraw the
14:30:02 20 congressional map to create two districts that allow black
21 voters to elect candidates of choice in a manner narrowly
22 tailored to comply with the VRA, such this map will satisfy
23 both the VRA and the Constitution.

24 Thank you, Your Honors.

14:30:18 25 JUDGE MARCUS: Mr. Rosborough, I have two questions

1 for you.

2 You first, the same question I put earlier to
3 Mr. Blacksher. The plan as adopted in '92 by the district
4 court in *Wesch* and approved by the Supreme Court on a summary
14:30:41 5 calendar, did that plan violate the Equal Protection Clause in
6 your view?

7 MR. ROSBOROUGH: Your Honor, I don't necessarily -- I
8 don't think that that plan at that time it was enacted in 1992
9 violated the Equal Protection Clause. I think the plan became
14:30:58 10 problematic because the state was required to assess the
11 districts with each districting cycle. And over time, over the
12 last few decades, Alabama has changed. And yet the state has
13 not performed that analysis. It certainly hasn't done so in
14 this cycle or the last cycle.

14:31:17 15 And so that district very well may have been and likely
16 was narrowly tailored when it was put into place in 1992, but
17 it no longer is. And that's an obligation the state has in
18 every cycle, and it ceased to do that here.

19 JUDGE MARCUS: Second question, a different one.

14:31:36 20 You have presented two different theories traveling on two
21 different causes of action; Section 2 claim, which your
22 colleague has argued, and a constitutional claim. For the
23 purposes of this preliminary injunction hearing, if you are
24 correct on the Section 2 claim, and I underscore if, would
14:32:05 25 there be any reason for this Court by your lights to address

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1 the constitutional question during this preliminary injunction
2 proceeding?

3 MR. ROSBOROUGH: Your Honor, I think the answer is no.
4 Any remedy for a Section 2 violation would have to be
14:32:27 5 constitutionally compliant. And, you know, we think our two
6 theories are consistent with each other.

7 So to the extent the state -- to the extent the Court
8 finds the Section 2 violation, no, I don't think it needs to
9 address our constitutional theory.

14:32:40 10 JUDGE MARCUS: The reason I raise the question, again,
11 assuming you are otherwise correct, which remains to be seen,
12 the reason I raise the question is because there is a long
13 standing doctrine in our court's history and the Eleventh
14 Circuit's history, the old Fifth Circuit history, and in the
14:33:02 15 Supreme Court to avoid constitutional questions, when you don't
16 have to answer them, and they might otherwise be resolved
17 through a statutory construction. Is that the correct
18 application of that principle of constitutional avoidance in
19 this case?

14:33:21 20 MR. ROSBOROUGH: I think it is, Your Honor. If the
21 Court rules that the plaintiffs have likely established -- have
22 met their burden and the Court wants to issue a preliminary
23 injunction on the Section 2 claim, I think it would be
24 appropriate and permissible for the Court to avoid a ruling at
14:33:41 25 this time on the constitutional claim under the canon of

1 constitutional avoidance.

2 JUDGE MARCUS: Conversely, if you were to lose on this
3 preliminary injunction on Section 2, then this Court would be
4 obligated to address the constitutional claim, correct?

14:33:59 5 MR. ROSBOROUGH: I think that's exactly right, Judge
6 Marcus.

7 JUDGE MARCUS: All right. Thank you. Judge Manasco,
8 any questions?

9 JUDGE MANASCO: (Shook head.)

14:34:07 10 JUDGE MARCUS: Judge Moorer?

11 JUDGE MOORER: No questions.

12 JUDGE MARCUS: All right. We thank you. The Milligan
13 plaintiffs have reserved five minutes for rebuttal, as well.

14 Mr. LaCour, I thought we would take a 15-minute break, and
15 then when we come back, we would be happy to hear your
16 argument. You have a full 90 minutes toward that purpose. You
17 can use as much or all of it as you see fit.

18 With that, we will be in recess for 15 minutes.

19 (Recess.)

14:48:43 20 JUDGE MARCUS: I see Mr. LaCour. Are counsel for the
21 plaintiffs present?

22 MR. BLACKSHER: Singleton is here.

23 JUDGE MARCUS: Thank you, Mr. Blacksher. I see
24 Mr. Ross and Ms. Khanna, as well. We are ready to proceed,
14:50:36 25 Mr. LaCour. Thank you.

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1 MR. LACOUR: Thank you, Your Honors.

2 This case represents an extraordinary attack on an
3 ordinary map.

4 We have here an equal protection claim that lacks any
14:50:52 5 mention of the current Legislature's intent, and we have a
6 Section 2 claim in which the plaintiffs themselves have proven
7 through two of their experts that you could not draw two
8 majority-minority districts if you drew based only on
9 traditional race-neutral districting principles.

14:51:09 10 So plaintiffs' equal protection claim fails because
11 traditional race -- redistricting principles were not
12 subordinated to race in the 2021 Legislature's map. And
13 plaintiffs' Section 2 claims fail at *Gingles I* because in each
14 of their 11 illustrative plans, traditional redistricting
14:51:28 15 principles are subordinated to race.

16 But before I get into the merits any further, I did want
17 to touch on the fact that the burden is incredibly high here.
18 Not only are they seeking an injunction, which is an
19 extraordinary and drastic remedy in and of itself, they're
14:51:46 20 asking for what essentially would be a mandatory injunction
21 where the burden would need to be even higher on them.

22 Let me move to the other laptop closer. Is this a little
23 bit clearer?

24 JUDGE MARCUS: It is. Thank you.

14:52:10 25 MR. LACOUR: Thank you.

1 So we are talking a preliminary injunction which in and of
2 itself is an extraordinary and drastic remedy, what would
3 essentially be a mandatory injunction because the Legislature
4 would need to act to put in place new maps on a very expedited
14:52:31 5 time frame. And then we're adjudicating a redistricting, which
6 the Supreme Court has repeatedly said is a serious intrusion
7 into the most vital of local functions. There are complex
8 interplays here. And in addition, you must presume the good
9 faith of the Legislature and exercise extraordinary caution
14:52:48 10 particularly when you are adjudicating racial gerrymandering
11 claims like those brought by the Singleton and by the Milligan
12 plaintiffs.

13 So I will turn first to the equal protection claim because
14 I do think some of the evidence you heard from the Milligan
14:53:04 15 plaintiffs actually benefits us tremendously when it comes to
16 the Section 2 claim. So I will start with equal protection and
17 move to Section 2 after that.

18 But if the Court has any questions, I am not here to give
19 a monologue. I would love to hear what is on each of your
14:53:21 20 minds and try to answer any questions you right have.

21 But again, evidentiary burden is particularly heavy for
22 the plaintiffs for a racial gerrymandering claim. It is not
23 enough to merely prove that the Legislature was aware of race.
24 After all, the Legislature was, of course, aware that District
14:53:37 25 7 was going to contain at least one black woman, Terri Sewell.

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1 They knew that District 6 was going to contain at least one
2 white man, Gary Palmer. You have to show that race
3 predominated, and that means that it subordinated traditional
4 districting principles.

14:53:52 5 And in addition, keep in mind we are looking at the -- we
6 are looking at intent of the Legislature, which any time you
7 are dealing with any law, it's going to be a particularly
8 difficult inquiry. We are talking 35 Senators, 105 members of
9 the House, the Governor, who signed this into being, and the
14:54:15 10 best intent -- the best evidence of intent of any law is to
11 look at the text.

12 Now, of course, the text here is a lot of coordinates. So
13 I think looking at the map is particularly good evidence. And
14 I will briefly share I think a map that everyone is well
14:54:32 15 acquainted with at this point.

16 If I can find it. There we go.

17 So, again, this is the map that Tom Bryan prepared that
18 was part of Defendant's Exhibit 2, and this is page 52. And as
19 we talked about a lot with a lot of witnesses this past week
14:54:55 20 and a half, this demonstrates some of the changes from the 2011
21 lines to the 2021 lines.

22 As we also establish through many witnesses and is evident
23 in a lot of the case law that we have cited in our PI response
24 that you will see in our findings of fact and conclusions of
14:55:13 25 law we submit Friday, it is a quite common thing for a

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1 Legislature when it sits down to draw lines every ten years to
2 start with the previous map. That's what we have here. Again,
3 these light blue lines show where the changes were made from
4 the 2011 map to the 2021 map.

14:55:33 5 Now, the unrebutted testimony in this case from the map
6 drawer is that his goal was to start with the guidelines. He
7 was handed the guidelines by the legislative redistricting
8 committee, which I will note, those were voted on by the
9 Legislature.

14:55:50 10 So it is a brief aside, but you heard some evidence or
11 testimony suggesting that the Legislature didn't have input and
12 that its process of drawing the map was outsourced to the
13 congressional district. That's -- that's not true. What
14 happened was you had a redistricting committee that came
14:56:08 15 together, that voted on and approved guidelines by an
16 overwhelming margin. One of the Democrats who voted in favor
17 of these guidelines was none other than plaintiff Senator Bobby
18 Singleton.

19 So for him to come to this Court and express surprise that
14:56:26 20 we ended up with a map that retained the course of districts
21 that minimized population deviation down to one person one vote
22 and that it tried to minimize county splits and protect
23 incumbents while trying to be compact is -- it's not quite
24 unclean hands, but it's a little bit disingenuous.

14:56:47 25 In any event, turning back, it's clear how we got to where

1 we got in 2021 in district -- between Districts 2 and 3 here on
2 the eastern border of District 2. You have a line where
3 Montgomery County -- split Montgomery County was taken away.
4 That's consistent with the guidelines to minimize splits of
14:57:09 5 counties.

6 You have -- if you are looking down between Districts 1
7 and District 7, you had the split of Clarke County closed off
8 to return all of Clarke County to District 7 and consistent
9 with that traditional race-neutral districting principle.

14:57:27 10 Then if you look up to District 7 on the north side, as
11 Mr. Hinaman explained is undisputed here, District 7 was lower
12 on population when compared with the other districts by about
13 53,000 people. We needed to find 50,000 -- 53,000 new people
14 to add to District 7, and he did consistent with the guidelines
14:57:54 15 that says how to draw compact districts was to make this a far
16 more regular district. By this line here that you are looking
17 at, the former line of District 7 going into Jefferson County
18 was far more narrow, for less regular and instead he broadened
19 that out.

14:58:15 20 Now, that required taking away some of the northern tip of
21 that line, and as a result, there was some population from the
22 Homewood area was moved from District 7 -- District 6, rather,
23 into District 7. And then finally, to equalize population and
24 to get more population, they had to go to another
14:58:37 25 population-dense county that had already been split. That was

1 Tuscaloosa County, around here.

2 I will return to this in a moment when we talk about
3 Dr. Williamson, why his analysis really is -- easily has no
4 bearing on the ultimate issue of whether race predominated in
14:58:57 5 this map.

6 But --

7 JUDGE MARCUS: Can I ask you a question about that
8 map?

9 MR. LACOUR: Yes, Your Honor.

14:59:05 10 JUDGE MARCUS: When the map was drawn in '92, it's
11 clear that that thumb sticks all the way into Jefferson County
12 and places it in District 7, and pretty much everybody
13 including the cartographer, Mr. Hinaman, has said that that was
14 done for a predominantly race-based reason, that is to say, to
14:59:31 15 create one majority-minority district.

16 I think I have those facts right on that, right?

17 MR. LACOUR: Yes, Your Honor.

18 JUDGE MARCUS: Did race predominate when they drew the
19 map in '92?

14:59:46 20 MR. LACOUR: Yes, it did. But that only gets you to
21 the second step of scrutiny.

22 JUDGE MARCUS: Correct. So get me to the second step,
23 if you would.

24 MR. LACOUR: Yes. And so I do want to be clear. Our
15:00:00 25 argument here is not that the VRA justifies the drawing of this

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1 map in -- drawing of CD 7 currently. At least, that's not an
2 argument we have developed at this point. Our argument is that
3 this is not a map in which race predominates, because a law
4 that happens to look a lot like another law from the past could
15:00:22 5 be passed for entirely different reasons.

6 What's relevant is not the intent of the 1992 Legislature,
7 or to be more accurate, the 1992 three-judge court that
8 ultimately ordered this map into effect. What's relevant is
9 the 2021 Legislature.

15:00:40 10 That's what the Court said -- the Supreme Court said in
11 *Abbott vs. Perez*. There you have a 2011 map of the Texas
12 Legislature that was deemed unlawful, a new map was put in
13 place by a court, by the three-judge court at issue there for
14 the 2012 elections, and then in 2013, you had the Legislature
15:01:02 15 enact a new map that looked a lot like the court-ordered map.

16 And then when the district court later reconsidered, said,
17 well, you didn't sufficiently purge the discriminatory intent
18 from the map that we had ordered you to conduct your election
19 on, on an interim basis, the Supreme Court said, well, no, the
15:01:22 20 2011 Legislature's intent is not the relevant inquiry here. It
21 is the 2013 Legislature's intent.

22 And I take the point from the Milligan plaintiffs that --
23 I believe the Singleton plaintiffs, too, that was an
24 intentional vote dilution claim and not a racial gerrymandering
15:01:36 25 claim. But both of those are products of the Equal Protection

1 Clause. And to state a claim under the Equal Protection Clause
2 you have to show intent. Whose intent? The intent of the
3 actor whose law you are challenging.

4 If I took one of my son's puzzles that had -- alphabet
15:01:54 5 puzzles, and I threw it up in the air, and at random, a couple
6 of words were spelled, I didn't intend to spell the words.
7 That was done at random.

8 Similarly, there could be very different -- but if I
9 purposefully arrange the letters to spell a word, there is
15:02:10 10 intent behind that.

11 And so then we have to ask, well, what was the intent that
12 led to this act, Act 2021-555? And we have excellent evidence
13 to show the race-neutral reasons that produced this map. It's
14 there in the guidelines that plaintiff Singleton voted for.
15:02:31 15 It's there. It just jumps off the face of the map if you look
16 at it.

17 And we are not really getting any sort of -- I mean, there
18 wasn't really any sustained argument against that, other than
19 the statistical analyses that you heard about from Drs. Imai
15:02:48 20 and Dr. Williamson. And I am happy and eager to address those
21 in a minute.

22 And then this idea that there is some affirmative
23 obligation for the state to purge a gerrymander. But that's
24 directly contrary to *Abbott*. It's also directly contrary to
15:03:05 25 *Cromartie*, which a case we cited right there, page 1 of our PI

1 response. And I will find the exact quote, if you have just a
2 moment. But it's *Easley v. Cromartie*, 532 U.S. at 249. And
3 what the Supreme Court said was, the Constitution does place an
4 affirmative obligation upon the Legislature to avoid creating
15:03:28 5 districts that turn out to be heavily even majority-minority.

6 So if you follow traditional districting principles, you
7 are fine. And that's exactly what we have here. That's black
8 letter law. And I have not seen an answer to it from any of
9 the plaintiffs in the three reply briefs that we got.

15:03:47 10 Similarly, like *Miller vs. Johnson* said that adhering to
11 traditional districting principles instead of creating as many
12 majority-minority districts as possible does not support an
13 inference that the plan discriminates on race.

14 So it's not enough for them to come here and say that
15 there's more we could have done equal to lower the Black Voting
16 Age Population, because the Equal Protection Clause does not
17 put some sort of racial ceiling on a district.

18 I think *Cromartie* says quite to the contrary. And if we
19 were to go about unpacking, I think that would be a much more
15:04:24 20 race-conscious action. I think what they are -- what the
21 Singleton and Milligan plaintiffs are demanding of us raises
22 far more Equal Protection Clause issues than what the
23 Legislature did here, which was draw lines race neutrally, come
24 up with race-neutral districting guidelines, hand them over to
15:04:45 25 the map drawer, and expressly tell them, draw maps on a

1 race-neutral basis, and all of the testimony is that that is
2 exactly what he did. That is how the map appears, as well.

3 They have not pointed to changes in the map that would
4 suggest that they were done for some racial purpose. And if
15:05:03 5 you look at the White Voting Age Population, the trends there,
6 1992, I believe it was around 63 percent of Black Voting Age
7 Population. Then you move to 2011, we were sitting around
8 60 percent. If you move to 2021, we're down to 54 percent. If
9 we're trying to pack, we are doing a pretty bad job of it. But
15:05:25 10 the answer is, is like there was this intervention in Alabama
11 political history in 1992 that produced this map.

12 But there's no equal protection obligation to keep an eye
13 on racial demographics and make sure that we undo it at just
14 the right moment. And that's for the import of the position
15 that's being pushed by Singleton plaintiffs and by the Milligan
16 plaintiffs. But it's, again, directly contradicted by cases
17 like *Easley vs. Cromartie* and *Abbott vs. Perez*.

18 JUDGE MARCUS: I think you have answered my question.
19 Thank you.

15:06:08 20 MR. LACOUR: Excellent.

21 Then I will turn briefly to Dr. Williamson's analysis and
22 why it proves nothing in this case. Really, for a similar
23 reason to Dr. Imai's, neither of them started with the prior
24 map. Their analysis was based on a fanciful premise that there
15:06:28 25 was a blank slate and said if Alabama were to draw a map

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1 starting at year 0, Alabama has a completely blank map other
2 than some county lines, I suppose, and they were to draw a
3 line, and they were to draw lines for the first time ever, you
4 wouldn't expect to see splits in CD 7 and in CD 2 and in CD 3.

15:06:51 5 Well, while professors might draw maps on blank slates,
6 that's not what legislatures do, and that's not what the
7 Legislature did here either. So that the obvious alternative
8 explanation to borrow language from *Iqbal* for why there are
9 splits in Tuscaloosa County and in Jefferson County and in
15:07:11 10 Montgomery County, is because they were already there.

11 And so unless there is some sort of new affirmative
12 obligation to every ten years try to unpack minority voters
13 through some race focused process, under the Equal Protection
14 Clause, which would be, again, very bizarre, his analysis
15:07:34 15 really shows nothing.

16 And then he talks about the fact that some of the voters
17 who were being added to District 7 were more likely to be black
18 voters than those who are being taken out, and I will pull up
19 the map one more time we were just looking at just to sort of
15:07:53 20 underscore why that is through a flawed way to look at things
21 or give to give the obvious alternative explanation.

22 So you have got some voters here between Districts 7 and
23 4. This is Tuscaloosa County. And you see that blue line.
24 Well, the reality is, I mean, District 7 has a population of --
15:08:15 25 a black population percentage of about 54 percent.

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1 So most places you go in District 7 are going to have the
2 substantial black population, and most places just across the
3 line into District 4 are going to have a somewhat similar black
4 population percentage. So we couldn't -- because of
15:08:35 5 contiguity, we couldn't just jump over south Tuscaloosa County
6 and go pick up voters from the more predominantly white part of
7 Tuscaloosa. And so that's again another obvious alternative
8 explanation there.

9 Similar issue if you look down to Districts 2 and 3, we
15:08:52 10 were closing off Montgomery, and when you do that, like you're
11 going to pick up people based on whoever happens to be in that
12 part of Montgomery. Going back down to closing the county
13 split at Clarke County between 7 -- District 7 and District 1,
14 and Clarke County is a Black Belt county. And when they close
15:09:14 15 that split you get down to the minimal number split of six, you
16 heard about when Dr. Duchin was testifying that was an easy and
17 obviously to do that.

18 So, again, I don't think his analysis sheds any light on
19 the real world reasons why the scores of legislators who voted
15:09:36 20 for Act 2021-555 decided to vote for this particular piece of
21 legislation.

22 Now, turning to Dr. Imai, this is where it really gets
23 fun. Dr. Imai ran 10,000 -- Dr. Imai was the expert if you
24 recall who had his algorithm that could produce thousands and
15:10:07 25 thousands of maps. And what he testified to was that he

1 programmed in to his algorithm -- and I will try not to read,
2 but I think I want to make sure I really get this -- really get
3 this right.

4 So here's how the Milligan plaintiffs describe what
15:10:29 5 Dr. Imai did. This is coming from Milligan docket entry 69,
6 page 26, if you look at the ECF pagination. They said, quote,
7 he created an algorithm that produced 10,000 simulated plans.
8 His race-neutral simulation drew maps that followed the stated
9 guidelines of creating seven contiguous districts keeping
15:10:50 10 population deviations to a minimum and never above .5 percent
11 developing districts that are reasonably compact, respecting
12 county boundaries where possible, and avoiding incumbent
13 pairings.

14 Then what the Milligan plaintiffs describe as their
15:11:05 15 striking finding is that of the 10,000 generated districts, not
16 a single simulated plan had a BVAP as high as District 7. BVAP
17 being Black Voting Age Population.

18 What I would note for this Court is that it appears that
19 none of the 10,000 maps included even one district of
15:11:24 20 50 percent Black Voting Age Population, and in the Milligan
21 plaintiffs' view, they said, quote, this alone shows that HB-1
22 used race as a predominant factor.

23 Now, I will return to that in just a moment. Let me first
24 explain why that's wrong as to HB-1. It's wrong to HB-1 for
15:11:44 25 the reasons Dr. William's analysis is completely flawed, too.

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1 Dr. Imai said he could have factored in core retention to his
2 algorithm. He could have included an additional traditional
3 districting principle. He decided not to. Maybe if he had
4 included it, his analysis might have shed a little bit of
15:12:05 5 light. But I think he said he wouldn't have really been able
6 to tell if race was doing anything if you had included the
7 cores of the previous districts.

8 So, again, if you start with a fanciful premise of the
9 blank slate map draw, you are going to get irrelevant results.

15:12:22 10 But interestingly, even when he's not constrained by core
11 retention, which means he has more discretion, he has more
12 ability to go out and find majority-minority districts,
13 consistent with traditional districting principles except for
14 one that he sort of arbitrarily decided to scrap, he still
15 couldn't find even one 50 percent BVAP district much less two.

16 And that is critical when we move to the *Gingles I*
17 analysis because what plaintiffs have essentially done -- if I
18 was the Caster plaintiffs, I might be a little upset with
19 Milligan plaintiffs at this moment, but what they have done is
15:13:01 20 they have shown to almost a mathematical certainty that if the
21 Alabama Legislature had sat down with Dr. Imai's algorithm and
22 said, let's figure out if it's possible to find a second
23 majority-minority district in Alabama, let's draw 10,000 maps
24 that all comply with our traditional nonracial districting
15:13:22 25 criteria, not one of them would have even one majority-minority

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1 district much less two majority-minority districts.

2 It follows -- and then Dr. Duchin does one better. She
3 said when she ran her algorithms, the algorithms she ran to get
4 her maps here, she made it a non-negotiable factor that there
15:13:46 5 be two minority-majority districts. So wherever any
6 traditional districting criteria came into conflict with race,
7 race was going to have to predominate.

8 And we heard individual testimony -- testimony from her
9 and Dr. Cooper saying -- not from Dr. Cooper -- from Mr. Cooper
15:14:00 10 rather that there were times when they were looking to split
11 precincts and decided to do it on a racial grounds to make sure
12 that they kept hitting the racial targets to make sure they
13 keep sorting voters based on race.

14 But Dr. Duchin said she ran 2 million maps in Alabama with
15 traditional districting criteria, albeit not core retention,
16 and so, again, she was freer than our Legislature would have
17 been to see what was out there in the world of race neutral but
18 otherwise traditionally drawn maps. 2 million maps, and not
19 one of them had two majority-black districts.

15:14:40 20 What that means is race necessarily has to predominate if
21 you are going to get a second majority-black district in
22 Alabama. And if that's the case, I ask you to put yourself in
23 the shoes of the Legislature. They run their 2 million maps.
24 They're trying do their best to comply with Equal Protection
15:15:02 25 Clause and comply with Section 2 of the VRA. They see that it

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1 is -- you can't even get a one in a million map, not even a one
2 in two million map, that has a second majority-black district
3 consistent with the guidelines.

4 So then it would fall to them to decide, okay, which
15:15:21 5 guidelines should we toss in favor of race? Core retention,
6 out the door. Incumbency protection, out the door. Which
7 should we compromise in favor of race?

8 Well, compactness. We know compactness was compromised
9 because if you look at our District 2 in the 2021 map, and you
15:15:36 10 look at their District 2, their Districts 2 do bizarre things
11 and stretch -- they split Mobile and stretch from Mobile all
12 the way to Russell County on the Georgia border.

13 Compromise at least in three of Dr. Duchin's maps on
14 county splits where she had seven, eight or nine splits instead
15:15:54 15 of six. And I think you can look at her maps and the racial
16 heat maps and see exactly why she was doing that.

17 So then the question is, like, what is the Legislature
18 supposed to do? And then second, I mean, how is the
19 Legislature supposed to know which traditional race neutral
15:16:13 20 districting criteria they are supposed to scrap in favor of
21 race, how many of them they are supposed to scrap, and how much
22 should race predominate in the districting process such that
23 they can comply with Section 2, but they're not violating the
24 Equal Protection Clause?

15:16:31 25 And then, I mean it's an unhappy task for you all because

1 how are you all supposed to decide when the Legislature has
2 struck that racial balance correctly? And I don't think -- I
3 don't think there is a judicially manageable principle that
4 would allow you to do that. I mean, look back at *Rucho vs.*
15:16:49 5 *Common Cause* just from 2019. That was the end of the long
6 journey to try to find a judicially manageable principle to
7 determine how much partisanship was too much in a redistricting
8 process.

9 And the Court finally said like, look, we just cannot
15:17:05 10 figure this out, there is not a good way to do it. How much
11 more so when you have got equal protection overlays factored in
12 here, how much -- how much should race predominate over
13 traditional districting principles? And we would contend that
14 the Court has already answered that and said none.

15:17:24 15 What Section 2 demands of a plaintiff trying to establish
16 that there is a reasonably compact district out there is that
17 they need to show consistent with traditional race-neutral
18 districting principles, you could draw that additional
19 majority-minority district.

15:17:43 20 And I think that's pretty clearly established from the
21 extensive litigation in the 1990's over Georgia's maps. And
22 excuse me for just a second.

23 So if you will recall, there was a sort of a trilogy of
24 cases and I think if you are looking for some of our like --
15:18:10 25 cases that are really resolve this -- one of the cases that

1 really resolves this would be that *Miller*, which is the '95
2 U.S. Supreme Court case, then *Johnson*, which is the remand to
3 the Southern District of Georgia, followed by *Abrams* which
4 affirmed -- which affirmed in *Johnson*, which affirmed the
15:18:26 5 *Johnson* decision.

6 And -- and it was interesting a moment ago counsel for
7 *Milligan* was referencing the 1992 DOJ objection to Alabama's
8 plan and was saying, like -- I guess it is evidence that
9 Alabama could have drawn a second majority-black district and
15:18:45 10 then really should have, and there was something sort of
11 suspicious that Alabama didn't do that in 1992.

12 Well, look at the *Miller vs. Johnson* case because what
13 happened to Alabama there is exactly what happened to Georgia,
14 where Georgia had just gone from 10 districts to 11 districts
15:19:02 15 after the 1990 census. And Georgia, just like Alabama today
16 had 27 percent black population. And the Georgia Legislature
17 looked everywhere to try to find a second majority-black
18 district.

19 They had one that was sort of centered around Atlanta.
15:19:18 20 They were looking around to try to draw a second that was
21 consistent with their traditional race-neutral principles.
22 They came up with a map, sent to it DOJ, and DOJ said, no. We
23 have a max-black policy. You need to draw three districts, not
24 just two, because three will get you to proportional
15:19:36 25 representation, 27 percent, which if that sounds familiar,

1 that's essentially what the plaintiffs are asking for here is
2 proportional representation despite the fact that Section 2
3 expressly says, nothing herein shall guarantee a right to
4 proportional representation.

15:19:52 5 But, anyway, returning back to Miller, Georgia finally got
6 the message. They drew their three majority-minority
7 districts, hit that proportional representation target, but
8 they had subjugate traditional race-neutral districting
9 principles to do that. And then they got sued under Equal
15:20:12 10 Protection Clause claim, and the Supreme Court in *Miller* said
11 that they did violate the Equal Protection Clause, and the case
12 got remanded back to *Johnson* -- or back to the district court,
13 which then produced the *Johnson* opinion.

14 And the three-judge court there ultimately had to draw
15 maps itself because the Georgia Legislature dead locked and
16 couldn't pass a map. And I think what the Court did there
17 should be very instructive for this Court, too. They looked at
18 traditional districting principles of Georgia. One of them was
19 that was Georgia had a long tradition of having a district in
15:20:48 20 each of the four corners of the state.

21 Of course, here in Alabama, we have a long tradition
22 dating back to at least the '70s of having a southwestern
23 district anchored by the Gulf, a southeastern district anchored
24 by the Wiregrass, and a northern District 5 that runs through
15:21:05 25 Tennessee Valley.

1 They also looked at the tradition of having a
2 majority-black district -- or anchored by Atlanta -- looked at
3 some of the other traditional districting principles, I believe
4 core retention was mentioned, and then ultimately said as part
15:21:22 5 of its Section 2 compactness analysis, we can not even draw a
6 second compact majority-minority district.

7 Again, despite the fact they had 27 percent just like
8 Alabama today, and they have 11 districts to work with, not
9 just 7, they said, we cannot consistent with Section 2 draw a
15:21:42 10 second majority-minority district. If you look at -- and this
11 is what they said. If you look at nonracial factors, it is
12 just not going to be doable. And that was a ruling. They
13 approved new map that had only one majority-black district, and
14 that got taken up, and the Supreme Court cited -- had to
15:22:01 15 consider whether the Section 2 analysis was correct, and the
16 Supreme Court affirmed, and that's when the Supreme Court said
17 Section 2 does not required a state to draw a predominantly
18 nonracial lines a map that is not reasonably compact.

19 What that means is you start with traditional race-neutral
15:22:18 20 districting principles. And race cannot predominate. That
21 does not mean Section 2 is not going to do anything. I'm sure
22 you will hear that from Caster plaintiffs and the Milligan
23 plaintiffs when they beam back in, in just a little bit.

24 But I think, Judge Marcus, you referenced *LULAC* a moment
15:22:38 25 ago. I think *LULAC* is a great example of where Section 2 can

1 really do some work in a vote dilution case without requiring a
2 state to subordinate traditional race-neutral districting
3 principles to race in its redistricting process. There you had
4 District 23 and District 25 at issue.

15:23:05 5 District 23 is interesting in that it had a -- it had
6 52 percent Latino CVAP there. They had a sufficiently compact
7 majority-minority population that came up just shy of Alstein
8 (phonetic), an incumbent.

9 When the Texas Republican party took back the House and
15:23:29 10 the Senate, they did a they redrew the lines, and they pulled
11 100,000 Latinos out of District 23, and they plugged 100,000
12 Anglo-Texans into District 23 to try to protect the incumbent.
13 And what the Supreme Court said there was, well, clearly
14 there's a compact district. And we know it is a compact
15 distract -- that you could draw a compact District 23 that had
16 a majority-minority population because it was already there.
17 It had been there before.

18 And so Section 2 did some work in that instance and -- and
19 what Texas did there was deemed to be violative of -- violative
15:24:12 20 of Section 2.

21 Now, in that same case, you had District 25 at issue. And
22 the reason District 25 got drawn was because Section 5 was
23 still in effect at the time in Texas. And Texas sort of undid
24 this Latino opportunity district in 23, in order to satisfy
15:24:31 25 preclearance, they drew a new Latino opportunity District 25.

1 Now, the problem was kind of like plaintiffs' District 2
2 in this case, they were combining disparate minority
3 populations. They started around the Rio Grande. They
4 stretched north and kept whole counties. It's not that
15:24:51 5 terrible of a looking district, but stretched all the way up to
6 Austin to pull in Latino voters from Austin. And the fact that
7 these voters in Austin and these voters on the Rio Grande both
8 wanted to elect Democrats wasn't enough to make them part of
9 one big community of interest.

15:25:07 10 The -- Justice Kennedy's opinion is clear. You can't just
11 assume from a group of voters' races they think alike and share
12 the same political interests and prefer the same candidates.

13 JUDGE MARCUS: Let me ask you about that case, if I
14 can for a moment.

15:25:24 15 MR. LACOUR: Absolutely.

16 JUDGE MARCUS: The problem there as you have pointed
17 it out, and the Supreme Court highlighted it in Justice
18 Kennedy's opinion was that the Legislature took a certain
19 portion of the Hispanic population found in Austin, Texas, and
15:25:42 20 combined it with a certain portion of the Hispanic population
21 300 miles away on the Texas/Mexican border. And there was
22 nothing apparently that tied the interests of the folks they
23 took from Austin to the population they combined it with on the
24 Mexican/Texas border. That was the problem. It was a big
15:26:13 25 elongated district, covered a whole lot of geography, and like

1 a bar bell on each end, you had disparate Hispanic communities.
2 That would be a fair description of what was going on and what
3 troubled the Court there. Do I have that right?

4 MR. LACOUR: Yes, Your Honor.

15:26:31 5 JUDGE MARCUS: I want you to help me with the
6 comparison to this case.

7 The plaintiffs say the difference here is, one, the
8 district isn't as big elongated. It's nothing like 300 miles;
9 and, two, that the African-American population is equally
15:26:57 10 distributed throughout that entire rectangular shape; and,
11 three, that there is a recognized community of interests in
12 that district.

13 Are those observations accurate, and do they fairly
14 distinguish *LULAC* from this case in your view?

15:27:22 15 MR. LACOUR: I don't think their observations are
16 accurate. First of all, note, everything is bigger in Texas.
17 It makes sense they will be able to stretch their districts a
18 little bit bigger than we might be here.

19 I think the districts they have draw here are still like
15:27:34 20 incredibly unusual in how they stretch from Mobile all the way
21 to the Georgia border.

22 In fact, if you look back at the *Wesch* decision from 1992,
23 the Court ultimately was trying to decide between two different
24 plans -- the Reed Plan and the Pierce Plan. Ultimately,
15:27:51 25 decided against the Reed Plan, in part, because it was going to

1 split Mobile and stretch all the bay to Georgia, and the Court
2 said that's not compact. The Court also said it's going to
3 scuttle the core retention of existing Districts 1 and 2, and
4 that's as a result, it's going to do a poor job at preserving
15:28:12 5 communities of interest.

6 So we don't just make this up yesterday. This is
7 something a court in Alabama recognized 30 years ago. But to
8 return more to your question, one, I don't think their plan is
9 really all that focused on that community of interest of the
15:28:31 10 Black Belt. And this is something I really want to make sure
11 is abundantly clear for the record. There are just fundamental
12 misstatements about what their plans and our plans do with the
13 Black Belt. Both Caster and Milligan state that we split the
14 Black Belt counties among four districts. That's not true. We
15:28:51 15 split among it three.

16 In the Caster reply, they state they put all the Black
17 Belt counties into one district. That's flatly false. They
18 split into three districts just like we did.

19 Similar, the Milligan plaintiffs assert that one of their
15:29:04 20 plans puts all 18 of their Black Belt counties into just two
21 districts. That's not true either. That's Plan D. If you
22 look, part of Pickens County is in a third district. So I
23 think all the plans in terms of keeping Black Belt counties
24 together do about the same.

15:29:21 25 Most counties of the Black Belt are in just two districts

1 in our plan and in the illustrative plans, but each of the
2 illustrative plans and our plan has at least one if not two
3 that stretch into a third district.

4 So -- and I don't think that was necessarily a conscious
15:29:40 5 misrepresentation by the plaintiffs, but I do think it
6 underscores the risks of trying to adjudicate such complicated
7 factual and legal issues on such a short basis that things like
8 that can be missed. But I will return to the equities later.

9 Getting back to communities of interest. I think the way
15:30:00 10 they have tried to define communities of interest is to
11 basically make it synonymous with race. And I think LULAC
12 talks about the fact that there are nonracial communities of
13 interest. And if you are allowed to just paper over that and
14 make communities -- define community of interest so broadly as
15:30:20 15 to really be tantamount to race, then you have -- like I think
16 you start to create equal protection violation -- equal
17 protection questions within Section 2.

18 And I mean, think about it this way, as well: I mean, it
19 would invite legislatures to engage in packing and to bless
15:30:37 20 that packing. This isn't racial gerrymandering. We are just
21 putting all the black people who are all part of one big
22 community of interest into one big district. I mean, that's
23 not racial. That's just communities of interest, you guys. I
24 mean, that clearly cannot fly. The Court should be very
15:30:56 25 cautious before embracing a theory like that.

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1 Moreover, Dr. Duchin said her goal wasn't just to pair
2 communities of interest or pair Black Belt counties together
3 within districts. It was expressly to put them into
4 majority-black districts, and I'm not aware of any traditional
15:31:15 5 districting principle that would say it's vital not only to
6 keep communities of interest together, but to make sure they go
7 into certain racially composed districts.

8 I mean, Mountain Brook is a like famous community in
9 Alabama. It's predominantly white. It has its own school
15:31:34 10 system and shops and other things that I am sure people find
11 sort of unique and special about it who live there. If the
12 Legislature said it's really important that we put Mountain
13 Brook a majority-white district and pair them with suburbs of
14 Huntsville, I mean, that would be an obvious equal protection
15:31:51 15 violation right there.

16 And I don't think there's any -- anything really that's
17 better about the particular proposal being pitched by the
18 plaintiffs in this case. I mean, certainly I don't think they
19 have done must have much to establish some connection between
15:32:08 20 the Black Belt and Mobile. And you heard from plaintiff Dowdy,
21 she said, my great, great, grandparents migrated to Mobile from
22 the Black Belt. But she also has family in Huntsville and
23 family in Birmingham. And I am sure she has cousins elsewhere
24 in the state and possibly elsewhere.

15:32:22 25 There are plenty of African-Americans who left the Black

1 Belt at some point for Chicago and for Detroit through part of
2 the great migration.

3 I don't think they're part of a community of interest with
4 anybody in Lowndes County or in Barbour County.

15:32:38 5 So and finally, and we have communities of interest that
6 we have proposed that really can be kept --

7 JUDGE MARCUS: Can I ask you -- before you go on to
8 those communities of interest, I take it you agree that there
9 is fairly defined a community of interest that comprehends the
15:33:05 10 Black Belt, however you define that geographic mass, right?

11 You agree with that?

12 MR. LACOUR: I think there's certainly evidence that
13 the Black Belt has unique aspects that could constitute a
14 community of interest.

15:33:20 15 JUDGE MARCUS: The reason I asked is we have said it
16 in opinions that the Black Belt constitutes a community of
17 interest, not the only community, but a community of interest.
18 And I just want to ask you whether you agree with that or you
19 think that's not so?

15:33:39 20 MR. LACOUR: I would not dispute what this Court has
21 said.

22 JUDGE MARCUS: And it would be marked by rural
23 agrarian rooted in the soil -- richness of the soil, et cetera,
24 that would constitute a community of interest, right?

15:33:59 25 MR. LACOUR: Yes.

1 JUDGE MARCUS: How far would that community of
2 interest extend as you see it? What would be bounded within
3 that community? 18 counties or something less?

4 MR. LACOUR: I think we have...

15:34:16 5 JUDGE MARCUS: Or something more.

6 MR. LACOUR: Stipulated to 18 counties that go from
7 Pickens over to Barbour and some of those counties in between.

8 JUDGE MARCUS: Thanks very much. I didn't mean to cut
9 you off. And you were about to turn to the Gulf Coast
15:34:34 10 community of interest, I think.

11 MR. LACOUR: Yes. I will note that these communities
12 of interest are not new inventions of the state. I mean, they
13 are -- you can see them if you look back at the maps from the
14 1970s. You can see them referenced expressly in the
15 three-judge court's decision in *Wesch* in 1992. And you heard
16 from former Representative Byrne today, and it was also his
17 testimony in the record from *Chestnut* litigation, former
18 Representative Joe Bonner's testimony, as well, about the
19 unique interests there.

15:35:14 20 We have heard as well from plaintiffs, like plaintiff
21 Shalela Dowdy who said, yeah, there are a lot of people from
22 Washington and Monroe County that go down to the port for work
23 and to shop. And that's not true of people who live almost in
24 Georgia. And counties themselves -- I mean, Dr. Davis talked
15:35:34 25 about the importance of counties in and of themselves as sort

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1 of an organizing principle for people. All those get blown up
2 by any of the illustrative plans. There's no plan that's been
3 produced that could keep Mobile County whole, that could avoid
4 dividing it up from Baldwin County, and through combining it
15:35:58 5 nearly all the way across the state.

6 And I mean, when Representative Byrne was talking about
7 the difficulties of presenting a place like -- I mean, really
8 has echoes in the LULAC decision. I will quote it for you.
9 This is 548 U.S. at 434. And the practical consequence of
15:36:19 10 drawing a district to cover two different communities is that
11 one or both groups will be unable to achieve their political
12 goals. Compactness is, therefore, about more than, quote,
13 style points, closed quote.

14 And I think that's exactly what you were hearing about
15:36:36 15 today from the Representative, that -- and he's explained why
16 it's important to have a district sort of anchored by the Gulf
17 and anchored by the port both for everyone who lives within
18 that district, and those now five counties, also for the entire
19 state. If the port is strong, it is our avenue -- it's
15:37:00 20 Alabama's avenue to the world. If the port is strong, then
21 that is going to be -- that's going to go down to the benefit
22 of every Alabamian. I think that's the testimony of
23 defendants' witnesses and many of plaintiffs' witnesses alike.

24 I note -- I know plaintiff Dowdy said multiple times,
15:37:17 25 what's good for the port is good for all of Alabama. And we

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1 would not contest that in any way.

2 I mean, if you look at some of the other problems with
3 their -- with their maps -- and we can -- I am happy to talk
4 more about with the mathematical impossibility of their map. I
15:37:36 5 think it was briefly referenced by Milligan's counsel after
6 talking about Imai and saying Imai's evidence is somehow
7 striking and proves racial predominance in our maps, but has
8 nothing to say about the illustrative plans.

9 I don't really understand that. Unless, again, their
15:37:56 10 theory is there is a traditional redistricting principle that
11 basically -- I mean, I think the approach is one that like is
12 fundamentally circular. They would allow a Section 2 plaintiff
13 to prove that it is possible to compose a district in
14 accordance with traditional districting principles by relaxing
15:38:22 15 or ignoring them, which is what their plaintiffs did to form
16 the maps that they formed in this case.

17 I mean, they, again, they scrapped core retention. They
18 said, that's too hard. It's impossible is what Dr. Duchin
19 said. I think Caster counsel said something to that effect a
15:38:41 20 moment ago. They -- no mind to incumbency protection except in
21 one of the 11 maps. Their District 2 is far less compact than
22 our District 2. And as a result, the District 1 is far less
23 compact.

24 We talked brief about communities of interest and how they
15:38:57 25 dread many long established and many judicially recognized

1 communities of interest. And I mean, Dr. Duchin testified
2 about the extra county splits and how she had a nonnegotiable
3 principle of making sure she hit her racial targets.

4 I mean, if a state came and said we had a nonnegotiable
15:39:20 5 principle of hitting nonnegotiable targets, we know what would
6 happen. It would lose equal protection claim. That's what
7 happened in the *Cooper* litigation.

8 So I did want to touch on something. There was a
9 suggestion that the *Davis vs. Chiles* case somehow undercuts our
15:39:42 10 argument. I think quite the contrary. *Davis vs. Chiles* --
11 *Chiles* is C-H-I-L-E-S, and I apologize for quoting. 139 F.3d
12 at 425 and then at 426.

13 What the Eleventh Circuit said was, Our precedents require
14 plaintiffs to show that it would be possible to design an
15:40:09 15 electoral district consistent with traditional districting
16 principles in which minority voters could successfully elect a
17 minority candidate.

18 Now, the problem there was that the district court said,
19 oh, well, the map drawer knew that race was -- he knew what the
15:40:26 20 race was of these two districts that he drew. And if a
21 Legislature did that and picked those maps because of their
22 racial breakdown, that would be an equal protection problem,
23 and, therefore, this fails. But that was not -- what the Court
24 explained was that's not the way to look at this.

15:40:44 25 They did explain like, and I will quote this, Certainly

1 race was a factor in various process -- he was a map drawer --
2 of designing the proposed subdistricts. But he testified that
3 it would have been difficult for him to have drawn some
4 districts for the Second Circuit and the Leon County courts
15:41:01 5 without creating at least two new majority-minority districts.

6 And the Court said, absent some evidence belying Terry's
7 characterization of his design process, Chiles cannot rely
8 solely on criticism of Terry's motivations, blocked Davis'
9 proposed remedies.

15:41:17 10 So I think what this drawing suggests is Mr. Terry here
11 had to compromise traditional nonracial districting principles
12 and subordinate them to race, then plaintiffs' claims would
13 have failed at *Gingles* 1 in *Davis vs. Chiles*, too.

14 And so I think an interesting way to think about it --
15:41:37 15 let's imagine Dr. Imai had done his analysis the right way,
16 which meant including also including core retention in the
17 algorithm, and he produced this 10,000 maps. 5,000 of them had
18 one majority-minority district, 5,000 of them had two
19 majority-minority districts -- well, all consistent with
15:41:57 20 traditional redistricting principles.

21 I am not sure if absent the VRA, the Legislature could
22 say, well, we want the one with two majority-black districts
23 just because of equal protection issues, although perhaps
24 because race might not predominate there.

15:42:15 25 Certainly, a VRA plaintiff could say, we are going to pick

1 from one of these good maps, instead of from one of those good
2 maps. But that's not what we are dealing with here. We are
3 dealing only with bad maps. They didn't produce a single good
4 map. And that's the critical difference.

15:42:29 5 So I mean, to go back to *Chiles*, I mean, again, Terry map
6 drawer said it would have been difficult for him to draw based
7 on race-neutral principles without getting at least two
8 majority-minority districts.

9 Dr. Duchin's testimony was exactly the opposite. She said
15:42:49 10 -- and this is at transcript page 685, quote, it is hard to
11 draw two majority-black districts by accident, which in her
12 view meant it showed the importance of doing so on purpose.

13 Like were not criticizing their motivations. I understand
14 that he have to keep race in mind when they're putting their
15 map together, but that doesn't mean race can predominate, and
16 that's obviously what we have here to a mathematical certainty.

17 And again, they -- it means what they had to do was they
18 have to bend and they had break numerous criteria to produce 11
19 racial gerrymanders.

15:43:31 20 And I don't think the Legislature would be able to draw a
21 map like that consistent with the Equal Protection Clause or
22 Section 2.

23 JUDGE MANASCO: Let me ask you a question about that.

24 So I understand the general contours of the argument. But
15:43:44 25 I took at a more granular level what Dr. Duchin to be saying is

1 that because of what she was asked to do as a *Gingles* I expert,
2 she took the 50 percent as a nonnegotiable threshold. And then
3 she only bent and broke insofar as was necessary not to come
4 under 50 percent. So, for example, I think -- and I don't have
15:44:13 5 the cite handy, but my memory is that she testified that after
6 50 percent, for example, she took not splitting counties to be
7 of greater priority.

8 Why is that inconsistent with the Section 2 mission? I
9 completely understand your argument as to why it's inconsistent
15:44:32 10 with the idea that we ought not be separating voters based on
11 race for constitutional purposes.

12 But in the limited universe of a Section 2 claim, why is
13 that hierarchy so long as it respects other traditional
14 districting principles insofar as it can along side the
15 50 percent threshold, why is it inconsistent with Section 2?

16 MR. LACOUR: Because I don't think that's what the
17 Court was referring to when it said reasonably compact. Again,
18 reasonable compactness analysis takes into account traditional
19 districting principles. And drawing a non-compact district to
15:45:16 20 benefit a racial group is not a traditional districting
21 principle. If it is, it makes their whole two Section 2
22 compactness argument self-referencing and really
23 indecipherable.

24 They're saying, we could draw a reasonably compact map
15:45:30 25 consistent with traditional districting principles if we ignore

1 some of them in favor of race. But that means it's not
2 reasonably compact. That's why the Supreme Court has said
3 Section 2 does not require a state to draw based on
4 predominantly on racial lines a district that's not reasonably
15:45:48 5 compact. What that necessarily means is that reasonable
6 compactness has to be without reference to race.

7 Now, like I said, if she drew two maps consistent with
8 racial -- consistent perfectly with traditional districting
9 principles, and one had two majority-minority districts and one
15:46:09 10 didn't, it would be perfectly fine for her to pick the one that
11 had the two majority-minority districts.

12 But what she testified to was that she drew 2,000 such
13 maps, 2000. Not 2000. 2 million. I am sorry. I was off by
14 the three zeros. 2 million maps where she didn't even plug in
15:46:28 15 all of our traditional districting principles into the
16 algorithm constraints. She had even more discretion than the
17 Legislature would have had to go out looking for majority
18 population to put within a district. And not one of them came
19 back above 50 percent. I mean, not one of them came back with
15:46:47 20 two districts above 50 percent.

21 And I -- so I don't know how it could be even -- how it
22 could be any clearer that race predominated.

23 I mean, it's not even a one in a million map we have in
24 front of us. These are maps you would never expect to see.
15:47:03 25 And I don't see how it could be that -- to return to the text

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1 of Section 2, we are talking about equal opportunity and
2 whether anyone has had equal access so political process denied
3 them based on account of race. I mean, is the Legislature's
4 failure to completely scrap several race-neutral traditional
15:47:28 5 districting principles and bend others in favor of race, like
6 isn't a refusal to do that somehow denying someone equal
7 opportunity? I think the answer is obviously no.

8 And you look at *Abrams*, again, keep in mind, I think they
9 hone in a lot on proportional representation. And you see it
15:47:48 10 throughout. But, of course, throughout the briefing -- but, of
11 course, Section 2 expressly says proportional representation is
12 not the benchmark. And we know it can't be the benchmark
13 because Georgia in the '90s had 27 percent black population
14 just like Alabama today. They have 11 districts they can work
15:48:08 15 with. We only have seven.

16 And even then the district court said, Section 2 only
17 gives me free reign to draw one majority-minority district,
18 9 percent of the state's black population -- or 9 percent of
19 the state's congressional districts were majority black, even
15:48:27 20 though 27 percent of the state's black population -- or blacks
21 made up 27 percent of the black's population, and the Supreme
22 Court affirmed that.

23 I think then in vote dilution itself, you heard about vote
24 dilution from plaintiffs. I mean, it diluted against what?
15:48:44 25 Against what standard? And proportional representation is not

1 the standard. It was an interesting discussion with Dr. Duchin
2 talking about Massachusetts and the Republicans there. And
3 because the Republican population in Massachusetts is so evenly
4 dispersed across the state, I mean, what she testified to was
15:49:02 5 that it is literally impossible to draw even one majority
6 Republican congressional district in Massachusetts, despite the
7 fact that there are nine congressional districts from the state
8 and despite the fact that Republicans regularly register about
9 a third, 35 percent in statewide elections.

15:49:22 10 So proportion representation is not the right baseline.
11 The right baseline is what would you expect from a race-neutral
12 draw of the districts? And we didn't have time to go out and
13 get an expert with an algorithm to produce 10,000 maps. But
14 the plaintiffs did. And we know what came back. 30,000 maps
15 from Dr. Imai, none of which have two majority-black districts,
16 and 2 million maps from Dr. Duchin, none of which have two
17 majority-black districts.

18 So, again, unless you are going to impute race as a
19 traditional districting principle in the Section 2 compactness
15:49:59 20 analysis, which I think the Court pretty expressly rejected in
21 *Abrams* when they found the three-judge court's decision in that
22 case, there is no way they can satisfy *Gingles I*. It's a
23 mathematical impossibility.

24 JUDGE MANASCO: Thank you. I think you answered my
15:50:16 25 question.

1 JUDGE MARCUS: Let me ask a follow up if I could,
2 Mr. LaCour, on Judge Manasco's question.

3 Does this issue, then, all boil down to whether some or
4 all of the illustrative plans were drawn in a reasonably
15:50:36 5 compact way? Is that the essential question you're
6 highlighting here?

7 MR. LACOUR: Yes.

8 JUDGE MARCUS: Reasonably compact.

9 MR. LACOUR: Yes.

10 JUDGE MARCUS: Okay.

11 MR. LACOUR: That reasonable compactness analysis
12 takes into account traditional districting principles like
13 maintenance of communities of interest and traditional
14 subdivisions and the other guidelines that we have been
15:51:02 15 discussing today.

16 JUDGE MARCUS: Thank you.

17 MR. LACOUR: Great. Let me see if there's anything
18 else I want to say on that point before moving on to another --
19 I think in *Miller vs. Johnson* similarly supports the notion
15:51:31 20 that the traditional districting principles you are looking at
21 in a Section 2 compactness inquiry are not race-focused
22 traditional districting principles. In *Miller*, the Court was
23 look at a racial gerrymandering claim -- the Court said -- this
24 is 515 U.S. 900 at 916. So in looking at a racial
15:52:08 25 gerrymandering claim, quote, a plaintiff must prove that the

1 legislature subordinated traditional race-neutral districting
2 principles, including but not limited to compactness,
3 continuity, and respect for political subdivisions or
4 communities defined by actual shared interests to racial
15:52:21 5 considerations. Where these or other race-neutral
6 considerations are the basis for redistricting legislation and
7 are not subordinated to race, state can defeat a claim. The
8 district has been gerrymandered on racial lines, close quote.

9 Now, the Court here nowhere suggests that there are
15:52:37 10 legitimate race-focused principles that states could point to
11 as a defense race predominated in their maps. It would make no
12 sense to allow a state to rebut a charge of racial
13 gerrymandering by showing the state was promoting race-focused
14 districting principles.

15:52:55 15 Now, of course, compliance with the VRA can justify a
16 racial gerrymander, but the need to employ race to comply with
17 the Voting Rights Act does not mean that there was never a
18 racial gerrymander in the first place. So I think it's similar
19 analysis when we're looking at the compactness inquiry. Are
15:53:13 20 race-neutral principles been subordinated to race or not? And
21 here obviously were.

22 Return for a moment on communities of interest. I did
23 find that I think -- it was not -- it's clearly not something
24 that Mr. Cooper had given a lot of thought to when we asked him
15:53:57 25 about communities of interest between the Gulf and the

1 Wiregrass. He suggested, well, it's from transcript 498: Do
2 you have an opinion about whether there's a community of
3 interest that includes both voters in Houston County and voters
4 in this wider portion of Mobile County that you include in
15:54:17 5 District 1? His response: There very well should be. They
6 live in south Alabama. I suspect maybe there's more University
7 of Alabama fans down in Mobile than the eastern part of the
8 state, Auburnland.

9 And, again, I think we have got communities of interest
15:54:32 10 here that have been recognized by courts for a long time, ample
11 testimony from plaintiffs and defendants that our maps preserve
12 them, and to the extent the Court is being asked to adjudicate
13 which one should get preference over the other, I think that,
14 too, potentially raises some justiciability questions.

15:54:53 15 I'm not sure how the Court is going to sort of decide this
16 one is more important than the other if there isn't a healthy
17 dose of deference to the Legislature. Again, we are not
18 inventing any nuance in the 2021 map. Again, it's a map that
19 looks a lot like the map is looked for 50 years now. And I
15:55:14 20 think that is some very strong evidence of what the Legislature
21 considers to be particularly important.

22 I will address for a moment the arguments about the State
23 Board of Education plan, which has gotten some play in the last
24 couple of days.

15:55:41 25 If you will recall, I believe this is Defendants'

1 Exhibit 26. The 2001 version of the State Board of Education
2 plan, which has eight districts just like -- eight districts
3 just like the current plan has eight districts did not split
4 Mobile. Mobile and Baldwin County and I believe one other
15:56:02 5 county were kept together in that sort of southwestern
6 district. Then you fast forward to 2011. And I think the
7 record shows that split came about in 2011. And the reason for
8 that was Section 5.

9 We had -- need to show that there was not retrogression.
15:56:24 10 But that particular district, there had been a majority-black
11 district north of Mobile or -- not majority black, it was at
12 least heavy percentage black north of Mobile that had lost a
13 substantial percentage of its population. And so at that --
14 its black population at that. Its numbers had gone down, and I
15 believe what the preclearance submissions will show is that the
16 state had a felt need to ensure that that number stayed about
17 the same for Section 5 purposes. The only way that could
18 possibly be done was to break into Mobile and split that county
19 and the State Board of Education plan as far as I am aware for
15:57:08 20 the first time ever.

21 So if anything, that just shows that the -- actually race
22 predominated over traditional districting principles there,
23 because we couldn't consistent with them maintain or really
24 surpass the Section 5 preclearance standard. And once you sort
15:57:28 25 of understand that, I think the -- whatever you can glean from

1 the 2021 map is really quite minimal other than the fact that
2 state followed its guidelines, both for its State Board of
3 Education map and for its congressional map, because we
4 retained the cores of that district just like we retained the
15:57:47 5 cores of our congressional districts. We did not try to sort
6 of undo that or affirmatively unpack or satisfy whatever novel
7 theory of Equal Protection Clause you've been hearing about
8 from the plaintiffs today.

9 So turning briefly to *Gingles II* and *III*, just to clear up
15:58:15 10 something that I think was said somewhat dismissively from the
11 Caster plaintiffs, we don't have a preferred definition of
12 black. That is not our argument that there's one proper
13 definition and another that's not.

14 Our only point is that if you are trying to satisfy
15:58:32 15 *Gingles I, II, and III*, you are not supposed to mix and match.
16 So and if they are going to mix and match single-race black
17 versus any-part black, it's incumbent on them to establish that
18 there's some strong basis for thinking that those people who
19 identify as any-part black are going to have -- really going to
15:58:57 20 be part of that same community or have the same interests as
21 those who identify as single-race black.

22 So that's the only point we have there.

23 I would note that, I mean, this need for them to trod out
24 for you all multiple different definitions and metrics by which
15:59:13 25 to measure black population in their illustrative plans just

1 suggests how incredibly thin they are slicing things here and
2 how hard it is for them to find a majority-minority population
3 within the state, which again ties back into what I think are
4 fatal *Gingles I* problems with their case.

15:59:34 5 Now, touching on the totality of the circumstances. As
6 the Supreme Court has recognized, things have changed in the
7 South. And as the Alabama and the NAACP court, Judge Watkins'
8 lengthy and well-reasoned opinion from 2020 recognized things
9 have changed in Alabama, as well. We think that politics and
15:59:58 10 not race is relevant to whether anyone has been denied equal
11 opportunity on account of race, which is the test in Section 2.

12 The Alabama NAACP decision had after a lengthy trial and
13 multiple years of litigation far more time than we had to build
14 a record in this case came away with the conclusion that the
16:00:19 15 reason why black-preferred candidates were not winning in
16 judicial elections in Alabama was not because they were the
17 candidates preferred by blacks, but because blacks preferred
18 Democrats.

19 If you look at the *Clements* decision from the Fifth
16:00:36 20 Circuit -- this is 999 F.2d 831 at 879 -- en banc court there
21 said, To extent the candidates preferred by black voters are
22 consistently defeated because of their substantive political
23 positions, per the casualties of interest group politics, not
24 racial considerations, this is not the harm against which
16:00:56 25 Section 2 protects. Section 2 protects black voters against

1 defeat on account of race or color, not on account of political
2 platform. And I submit that we have come forth with evidence
3 to show that to the extent the black-preferred candidates are
4 not prevailing in congressional elections in Alabama is on
16:01:15 5 account of political party platform, not on account of race.

6 We do have evidence that white Republicans support black
7 Republicans. We have Kenneth Paschal's recent election to the
8 State House. He's a black Republican from the famous Shelby
9 County. We have also established that in any state where there
16:01:37 10 is a substantial black population, black voters are going to
11 vote overwhelmingly Democratic, which means that the VRA is
12 only going to kick in if there are white voters who tend to
13 support the Republican Party. And I don't think the VRA was
14 passed to give Democratic Party interests a second bite at the
16:01:57 15 apple every single redistricting cycle.

16 Touching briefly on some of the other totality of the
17 circumstances evidence, which we will address much more fully
18 to the extent we can in our findings of fact and conclusions of
19 law. I think we have shown that many of the gaps between white
16:02:16 20 the black Alabamians of our similar or even less severe than
21 what you would see between black and white Americans
22 nationwide. I know the Milligan plaintiffs think that is
23 totally irrelevant. But I have a hard time seeing how it could
24 be irrelevant if there was a gap of 1 percent of voter
16:02:38 25 registration in Alabama and 20 percent nationwide, I think that

1 would obviously be relevant on whether Alabama's history was
2 influencing a sort of disparity there.

3 So if you look at what Dr. King said, she -- and I believe
4 it was the -- I believe she was with Caster plaintiffs. I'm
16:03:00 5 sorry. I am getting a little mixed up this late in the day.

6 They referred to what they call widely disparate incarceration
7 rates in Alabama. But when you look at the source she actually
8 cited, it showed Alabama's black/white disparities in
9 incarceration rates were the second lowest in the country out
16:03:19 10 of all 50 states.

11 If you look at voter registration, voter turnout rates
12 from the Census Bureau over the last several years, Alabama is
13 doing far better than many other states that don't have
14 Alabama's regrettable history of racial discrimination.

16:03:37 15 And while the Milligan plaintiffs have said that
16 comparisons are irrelevant, both Drs. Bagley and King have
17 comparisons in their reports and said in their testimony that
18 such comparison could be helpful.

19 So I would leave you with that.

20 Now, one other potential way to look at Section 2 issue
21 would be to look at Brnovich. There was something from the
22 Supreme Court's most recent Section 2 case that I found
23 interesting. It's actually from Justice Kagan's dissent where
24 she was putting forward a more plaintiff-friendly reading of
16:04:19 25 Section 2, and in her -- and I will stipulate, of course, it

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1 was not a vote dilution case, but it does still involve the
2 exact same statute and the exact same claim.

3 She said Section 2 demands of plaintiffs proof of a
4 statistically racial disparity in electoral opportunities, not
16:04:41 5 outcomes, resulted from a law not needed to achieve a
6 government's legitimate goals.

7 If we were to apply Justice Kagan's view of what Section 2
8 demands here, I think we would easily surpass that. We have
9 legitimate reasons for core retention. We have legitimate
16:04:59 10 reasons for incumbency protection. We legitimate reasons for
11 keeping the counties that have been CD 1 for 50 years in CD 1
12 and for not stretching CD 2 from one border of the state to the
13 other border of the state.

14 And we know that we can't pursue those legitimate goals in
16:05:21 15 compliance with the demands of the Section 2 plaintiffs in this
16 case.

17 So I think even under Justice Kagan's reading of Section
18 2, their claims would necessarily fail.

19 And I don't say that that's a controlling opinion, but I
16:05:36 20 do think it sheds some light on how the Court should be
21 thinking about Section 2 and what it is that it's really
22 supposed to be doing. And I don't think it is a black
23 maximization statute, rather DOJ thought that was the case in
24 the early '90s, and the Supreme Court disabused them of that
16:05:57 25 motion in *Miller v. Johnson* and the *Abrams* case.

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1 So here again, based on maps drawn based solely on
2 race-neutral traditional principles, the most you could hope
3 for would be one majority-black district, and that's what we
4 have.

16:06:16 5 I would like to turn to the equities now unless the Court
6 has further questions about the merits.

7 So first, I think there was some suggestion that the
8 process was -- the redistricting process was rushed, that we
9 had delayed in some way. I will just simply remind the Court
16:06:43 10 that the state of Alabama did not cause COVID. The state of
11 Alabama did not cause the Census Bureau's delays in turning
12 over critical data that we needed to redistrict. We were
13 supposed to know by March 31st, I believe. We were supposed to
14 get our data by March 31st and as of -- by March 31st. But mid
16:07:11 15 to late March, the bureau announced they weren't going to give
16 us the data until September 30th. We didn't sit on our hands
17 and wait. We actually sued the Census Bureau in part based on
18 that delay and said you have a statutory obligation to give us
19 that data far sooner than September 30th. And just several
16:07:29 20 days after we brought that lawsuit, the bureau announced
21 actually they could give us to about six weeks earlier than
22 they had initially anticipated. That's how we ended up getting
23 that data in the middle of August.

24 And we immediately got to work finalizing or -- drawing
16:07:45 25 and finalizing maps. The Legislature had been told by the

1 Secretary of State the maps were going to be needed by early
2 November in order to do all the different administrative steps
3 needed to get ready for an election. I will talk about a few
4 of those in a moment. And so that was for the window the
16:08:04 5 Legislature was working in, and despite it being very tight,
6 they were numerous public hearings held.

7 Also, just keep in mind, while this litigation has really
8 centered on the congressional districts, there were three other
9 sets of maps we have to draw this particular time around.

16:08:21 10 The State House, State Senate, and the State Board of
11 Education maps, that's another 148 districts that needed to be
12 drawn, needed to be debated, needed to be voted on eventually.

13 THE COURTROOM DEPUTY CLERK: Mr. LaCour, you have
14 ten minutes.

16:08:44 15 MR. LACOUR: Thank you, Frankie.

16 With all this mind, we have been at this about two months.
17 And the election machinery is well -- is already humming along.
18 As you know, the qualifying deadline is January 28th, we're
19 talking two weeks from when our findings of fact and
16:09:06 20 conclusions of law are due.

21 Now, there was a lot of discussion about May 24th as the
22 primary election date and sort of a suggestion that we have a
23 leisurely four months by which the Legislature could come back
24 together and draw a new map that complies with either like
16:09:26 25 these violations of Section 2 alleged by the plaintiffs or by

1 an equal protection demands that the plaintiffs have we think
2 invented, but May 24th is not the critical deadline. The
3 critical deadline is Marsh 30th. And I will tell why it's
4 because that's when you absentee ballots need to be printed and
16:09:45 5 ready to go. So we're talking seven weeks away from the
6 election beginning, not four months.

7 And April 9th, we have the federal law deadline to send
8 out our UOCAVA ballots. Those are to servicemen and women
9 overseas and other federal employees overseas. We have to get
16:10:04 10 those ballots out the door to them.

11 If you are looking for some other dates and deadlines,
12 Defendants' Exhibit 7 is the administrative calendar, the
13 Secretary of State's administrative calendar. It's included
14 with the declaration of the Director of Elections Clay Helms.

16:10:24 15 And I think his declaration is also incredibly important
16 evidence on this. And I have not heard anything from the
17 plaintiffs to really rebut it. He's explained that in -- I
18 believe it's about 40 to 45 of Alabama's 67 counties, the
19 process of assigning voters to the appropriate voting districts
16:10:46 20 is manual. It's a very time-consuming process.

21 They literally take out maps. They have their voter
22 registration information, and they say, well, you live at 123
23 Main Street. Let's look at the map. 123 Main Street is in
24 District 2. We will assign you to District 2. You will make
16:11:05 25 sure when you show up to vote you go to the right precinct and

1 you get the right ballot. So you are voting for the candidates
2 of District 2, not the ones for District 1.

3 That's the process that takes -- in the past, it took I
4 believe three to four months is what he has averred in his
16:11:23 5 declaration. And I have not heard any to the contrary deadline
6 proposed by the plaintiffs to suggest that he is pulling the
7 wool over on plaintiffs in this case. And that's consistent
8 with similar testimony he gave by declaration in our litigation
9 against the Census Bureau in the spring of 2021.

16:11:46 10 I think also this Court should take into account what
11 Bradley Byrne and what other people have testified to, which is
12 if you dramatically shift the lines and you move hundreds of
13 thousands of voters out of one district and hundreds of
14 thousands of new ones into the district, that's going to create
16:12:07 15 confusion for those voters. It will create serious problems
16 for candidates, and you will potentially have several districts
17 with no incumbent and maybe no candidate running in it, which I
18 think is not good for the Democratic process. It is severe
19 public harm.

16:12:24 20 I mean, if you look at the *Favors v. Cuomo* decision, the
21 Eastern District of New York, that's 881 F. Supp. 2d, 356,
22 there's a really key quote they have from Nate Persily, who is
23 one of the leading experts on election law issues. They said,
24 quote, A court should have as its goal the imposition of a plan
16:12:48 25 no later than one month before candidates may begin qualifying

1 for the primary ballot, which means that the court should begin
2 drawing its plan about three months before the beginning of
3 ballot -- before the beginning of ballot qualification in order
4 to build in time for possible hearings and adjustments to
16:13:04 5 plans.

6 I think that's wise, and I think we are well past that. I
7 mean, you have already heard some of the difficulties and
8 potential complications of if this Court were to enter a
9 preliminary injunction, it's not even clear if the Legislature
16:13:17 10 at this moment would need to draw two majority-black districts
11 or just two districts that would perform for -- for black
12 voters even if they weren't at 50 percent.

13 And, of course drawing map isn't the end of the story. We
14 would have to come back, and it would have to be analyzed by
16:13:35 15 this Court. We would have more experts coming in to say this
16 does perform or this doesn't perform. And keep in mind too, we
17 have three sets of plaintiffs here with some competing theories
18 of what the federal law demands.

19 So I don't expect if Singleton wins that the Caster and
16:13:51 20 Milligan plaintiffs will be really thrilled with the product
21 from the Legislature and vice versa. So we may have more
22 litigation over the remedial map. So this would not be our
23 last hearing by any means.

24 The complaints about the need for urgent action are
16:14:10 25 tempered a little by the longevity of the alleged harms. I

1 think by their theories, there have been some sort of packing
2 issue for at least a decade. There's been underrepresentation
3 or vote dilution claim for at least a decade. Lakeisha
4 Chestnut, one of the Caster plaintiffs did sue us, but it
16:14:33 5 wasn't until 2018. The Singleton plaintiffs sued over the 2011
6 map. They waited ten years to do that.

7 So I just think that, in particular, when you are looking
8 at maps and political geography that has been so settled in the
9 state for so long, equities would suggest that like courts
16:14:51 10 should do who courts have done in numerous cases when you have
11 requests for preliminary injunctive relief this late in the
12 day, and that would be to say, like if the Court were to make
13 some new law and deem this map to be unconstitutional, to allow
14 it to be used one more time, because I don't think if you adopt
16:15:09 15 the plaintiffs' approach to Section 2 *Gingles I* or if you adopt
16 this new theory of equal protection by which we have an
17 affirmative obligation to sort of undo a VRA district years
18 later, I don't think this Court will be the last word on that.

19 So and that's -- I mean something else that was noted as
16:15:31 20 well as well by the *Favors* court, that these complicated
21 record-intensive cases, complicated legal issues, and the Court
22 said, like, we have only will a few weeks to even dig into
23 this. I mean, we put together -- we were able to get two
24 experts together. We were able to get some good testimony in
16:15:50 25 front of you all. I know there's more we could say. You heard

1 from all the historians. We haven't had time to get around.
2 We haven't had time to get our own algorithmic math whiz to
3 redo or duplicate some of the stuff the Drs. Imai and Duchin
4 have done.

16:16:05 5 But I do think this claim -- before this Court goes and
6 alters the state's political geography and political destiny,
7 it needs to be very, very sure that we have done something
8 wrong here.

9 And, honestly, I think these are incredibly ordinary maps.
16:16:23 10 It's clear why they were drawn like they were drawn. It's
11 right there in the guidelines. These were race-neutral reasons
12 for doing it. And at the same time, as well, like Section 2
13 does not require anything different from what the Legislature
14 did.

16:16:39 15 As the Court in LULAC said, the purpose of the VRA was to
16 prevent discrimination and the exercise of the electoral
17 franchise and to foster our transformation to a society that's
18 no longer fixated on race.

19 Here, we know thanks to plaintiffs' own experts that if
16:16:55 20 race were not considered, it is virtually impossible to draw a
21 map with two majority-minority districts. Section 2 does not
22 require separate but equal congressional districts for
23 Alabamians; thus, because Section 2 does not require Alabama to
24 subordinate its traditional race districting principles to
16:17:09 25 race, those Section 2 claims necessarily fail.

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1 JUDGE MARCUS: Thank you very much, Mr. LaCour. We
2 will take our usual break of 15-minute break and then come back
3 with the rebuttals, and we will finish up this afternoon.
4 Thank you all. We will be back in 15 minutes.

16:17:48 5 MR. LACOUR: *Favors* was the longer quote.

6 JUDGE MARCUS: Why don't you give us the full title of
7 that case that came under the Eastern District of New York.

8 MR. LACOUR: *Favors v. Cuomo*, 881 F. Supp. 2d 356, 362
9 -- or at 362. That's Eastern District of New York 2012.

16:18:20 10 JUDGE MARCUS: Thank you much. We will take a
11 15-minute break at this point.

12 (Recess.)

13 JUDGE MARCUS: The parties are ready to begin the
14 reply at this point? Do I have that right, Mr. Blacksher,
16:29:24 15 Ms. Khanna, and Mr. Ross?

16 MR. BLACKSHER: Yes.

17 MR. ROSS: Yes, Your Honor.

18 MS. KHANNA: Yes, Your Honor.

19 JUDGE MARCUS: All right. Thank you.

16:29:34 20 Mr. Blacksher? We will take it in the same order that the
21 arguments were made by the plaintiffs.

22 MR. ROSS: Your Honor, if I may, the Caster plaintiffs
23 have allowed the Milligan plaintiffs to go next.

24 JUDGE MARCUS: I'm sorry. You mean the Singleton
16:29:55 25 plaintiffs.

1 MR. ROSS: Oh I'm sorry. I believe it will go
2 Singleton, Milligan, and then Caster. I'm sorry, Your Honor.

3 JUDGE MARCUS: Thank much. Mr. Blacksher, you may
4 proceed.

16:30:04 5 MR. BLACKSHER: Judge, you made -- Judge Marcus, you
6 made a -- asked an important question.

7 If the Court rules for the plaintiffs, what should it tell
8 the Legislature to do? Because whatever this Court tells the
9 Legislature -- what it tells the Legislature it did wrong, and
16:30:39 10 what it tells the Legislature it must do right in the future is
11 going to be the benchmark for redrawing congressional districts
12 probably for several more decades.

13 So it seems to us that the choice is between telling the
14 Legislature that it must draw districts by beginning with a
16:31:05 15 racial target, or whether it should draw districts by beginning
16 with traditional districting criteria, we believe that if this
17 Court were to rule for the plaintiffs -- the Milligan and
18 Caster plaintiffs on their Section 2 claims without addressing
19 their Fourteenth Amendment claims, that necessarily says to the
16:31:35 20 Legislature the 2021 enacted plan violated the Voting Rights
21 Act because it did not contain two majority-black districts,
22 per *Bartlett vs. Strickland*. Now, that's going to say to the
23 Legislature that they should begin any remedial plan with a
24 racial target.

16:32:01 25 What the Singleton plaintiffs have proposed is that the

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1 Court say to the Legislature the problem with your 2021 plan is
2 that it perpetuated a gerrymander that violated traditional
3 districting principles by splitting Jefferson, Tuscaloosa, and
4 Montgomery counties for the purpose of reaching a racial
16:32:29 5 target, namely a black-majority district. And, therefore, you
6 should begin again solely with race-neutral principles which
7 are historically in Alabama, whole counties, and see what kind
8 of plan you can draw, and then to achieve the lowest
9 practicable population deviation, and then look to see whether
16:33:01 10 or not it complies with Section 2 of the Voting Rights Act.

11 If it does not comply Section 2 of the Voting Rights Act
12 by providing blacks the opportunity to elect candidates of
13 their choice that Section 2 guarantees, then your plan must be
14 modified however is necessary to accomplish that statutory
16:33:24 15 objective.

16 So that's critical to us. We have been interested from
17 the beginning in the Singleton case, our clients are interested
18 in trying not only to win a lawsuit for 2022, but to try to get
19 our redistricting process back on track. That's something that
16:33:54 20 legislators and ordinary citizens and incumbent members of
21 Congress can understand and apply without having to have a
22 statistician with algorithms next to their elbow.

23 Let me respond to something that Mr. LaCour said. He's
24 characterized the Singleton plaintiffs' claims as a novel
16:34:31 25 Fourteenth Amendment claim. It is nothing but novel. And let

1 me, if the Court would permit, let me share the screen with
2 you.

3 So, Your Honor, what I have on the screen is Section 2G of
4 the redistricting guidelines. And let me read what it says.

16:34:59 5 No district will be drawn in a manner that subordinates
6 race-neutral districting criteria to considerations of race,
7 color, or membership in a language-minority group, except that
8 race, color, or membership in a language-minority group may
9 predominate over race-neutral districting criteria to comply
16:35:22 10 with Section 2 of the Voting Rights Act, provided there is a
11 strong basis in evidence in support of such a race-based
12 choice. A strong basis in evidence exists when there is good
13 reason to believe that race must be used in order to satisfy
14 the Voting Rights Act.

16:35:43 15 Now, what the state is saying, that is essentially the
16 statement of law that the Singleton plaintiffs in this action
17 are attempting to enforce. What the state is saying is that
18 the 1992 racial gerrymander done for good reasons, thinking it
19 was required by Section 2 of the Voting Rights Act, is now a
16:36:19 20 race-neutral districting criteria.

21 And as I pointed out, the Supreme Court has said you
22 cannot entrench -- that is entrenching a racial gerrymander,
23 precisely what the Supreme Court has said the state may not do.

24 But that is the state's defense here. They are not
16:36:40 25 claiming, as Mr. LaCour emphasized, that perpetuating the 1992

1 racial gerrymander is justified by the Voting Rights Act. They
2 are saying there was no gerrymander at all because that 1992
3 plan has become race-neutral criteria.

4 Finally, let me just respond to Mr. LaCour's concern about
16:37:19 5 the problems of election officials assigning voters to the
6 correct precincts if the Court orders a remedy in time for use
7 in the May 24th primary.

8 In the case of the congressional districts, if the
9 Legislature adopts, either by enacting a new plan or by a court
16:37:47 10 order, the whole county's plan that the Singleton plaintiffs
11 have provided or one like it, there's very little problem
12 assigning voters to their precincts in each county because they
13 all have the same congressional representative to vote for.
14 There's no precinct split.

16:38:12 15 So what the plaintiffs in the Singleton case have asked
16 this Court to do at the end of their motion for preliminary
17 injunction and amended motion, is if it finds for us that --
18 the plaintiffs, that the 2021 plan perpetuates a racial
19 gerrymander without justification, that it should tell the
16:38:42 20 Legislature that the plan proposed by the plaintiffs -- the
21 whole county plan -- is constitutional, or in that if they
22 thought that the whole county plan has too large a population
23 deviation, then they can lower the population deviation in the
24 way Singleton 2 and 3 plans do, or in some other way that
16:39:10 25 splits just a few thousand people out of a couple of

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1 counties -- something that I don't like at all, Your Honor. I
2 call them deviation orphans.

3 But that is unquestionably what this Court must do,
4 because the Supreme Court time and time again has heard from
16:39:31 5 dissenting members of the Court that we are just encouraging
6 gerrymandering for the sake of mathematical equality. And so I
7 don't think this Court has any choice but to consider lowering
8 the deviation to a level below -- probably below the 2.46 or
9 2.47 that the Singleton plan itself has unless *Tenant vs.*
16:39:56 10 *Jefferson County* suggests that the Supreme Court is finally
11 backing down enough to provide some fairness and common sense
12 for ordinary citizens.

13 But, in any event, that's not an issue that we can give
14 you any policy guidance on, because you have to look at the
16:40:13 15 cases and decide that that's a decision for the Court, it's a
16 question of law.

17 I think that's the end of my --

18 JUDGE MARCUS: Thank you, Mr. Blacksher.

19 We will hear now from counsel for Milligan.

16:40:25 20 MR. ROSS: Yes, Your Honor. There's a lot to respond
21 to, so --

22 JUDGE MARCUS: Will you take down from the screen
23 that -- thanks very much.

24 MR. BLACKSHER: Sorry.

16:40:37 25 JUDGE MARCUS: Quite all right.

1 Mr. Ross, you may proceed.

2 MR. ROSS: Thank you, Your Honor.

3 Your Honor, it is the state that presents circular
4 arguments. First, it's the defense that says that for Section
16:40:47 5 2 -- a Section 2 claim to be viable, plaintiffs must satisfy
6 *Gingles I* without considering race.

7 And then, secondarily, they say that on the racial
8 gerrymandering claim, that race can predominate, even when it's
9 necessary to comply with the Voting Rights Act.

16:41:05 10 But Mr. LaCour's only right as to the second point. The
11 Supreme Court has repeatedly said that compliance with the
12 Voting Rights Act means that a state can consider, it's not,
13 *per se*, unconditional to purposefully draw majority-black
14 districts.

16:41:22 15 This is because even if race does predominate, a state
16 will still -- a map can still be constitutional if it's
17 narrowly tailored to comply with the Voting Rights Act.

18 Indeed, the state's own redistricting guidelines and the
19 state's own expert, Mr. Hinaman, considered race, required the
16:41:41 20 consideration of race, and Mr. Hinaman drew the majority-black
21 District 7 intentionally to create a majority-black district.
22 He plainly said so in his testimony. He also plainly said that
23 even if that district had not turned out majority black, he
24 himself would have adjusted it so that it would still be a
16:42:01 25 majority-black district.

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1 So that is very similar to what Dr. Duchin did here. Like
2 the state, she considered race only to the extent necessary to
3 draw the two majority-black districts and to satisfy *Gingles* 1.
4 Dr. Duchin didn't consider other redistricting principles. She
16:42:19 5 said that her non-negotiables were compactness, maintaining
6 communities of interest, particularly the Black Belt, and that
7 the reason her maps are cut across the state is because the
8 Black Belt, a community of interest that has existed in Alabama
9 for 200 years, itself cuts across the state.

16:42:35 10 Dr. Duchin also prioritized not cutting -- splitting
11 counties and she did so in one map, and split fewer counties
12 than the state's map.

13 Only after considering all of these other factors did she
14 look at race to satisfy *Gingles I*. And even if Dr. Duchin
16:42:53 15 didn't draft -- even so, she drafted two majority-black
16 districts with bare majority black populations, even though she
17 testified that it would be possible for her to draw two
18 majority-black districts with higher black populations. She
19 drew them with lower populations because she was trying to
16:43:09 20 narrowly tailor them, as is required by the Constitution.

21 Moreover, again, nothing is *per se* constitutional about
22 even setting racial targets. The Supreme Court said in *Bethune*
23 *Hill* and the *Alabama Legislative Black Caucus* case that the use
24 of racial targets are valid means of complying with the Voting
16:43:31 25 Rights Act.

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1 Indeed, in *Bethune Hill* the Supreme Court upheld the
2 state's use of a 55 percent BVAP racial target, where the state
3 had good reason to set that target to comply with the Voting
4 Rights Act.

16:43:44 5 Here, again, Alabama's own redistricting principles,
6 consistent with its recent Supreme Court precedent, require the
7 state to take into consideration Section 2. And the state's
8 own guidelines when talking about communities of interest
9 discuss that race is one thing that can be considered.

16:44:04 10 Second, there's been a lot of talk about communities of
11 interest, but as the state and other -- as many witnesses who
12 testified today have said over the last few weeks, not every
13 district has to contain a single community of interest. Many
14 of the districts that currently exist have multiple communities
16:44:24 15 of interest in them.

16 Huntsville may have different interests than Franklin
17 County. Birmingham may have different interests than Selma. And
18 so there's no requirement, either under the state's
19 redistricting guidelines, or under the considerations that
16:44:38 20 Mr. Hinaman or the Legislature took into consideration that
21 every congressional district must contain a single community of
22 interest.

23 Here, however, the Black Belt, as I said, is a community,
24 a black community that has existed in Alabama for 200 years.
16:44:56 25 Nearly every witness, including Representative Byrne, testified

1 that the Black Belt is a community of interest. Every witness,
2 including Representative Byrne, testified that there is a clear
3 community of interest that exists between black people and the
4 community in Mobile and the Black Belt in the northwest of the
16:45:13 5 state.

6 But the state split Mobile County to comply with the
7 Voting Rights Act to draw the two majority black board of
8 education districts is compelling evidence that, consistent
9 again with the state's own redistricting criteria, that the
16:45:29 10 state could and should draw split Mobile County in order to
11 draw two majority black congressional districts.

12 Third, I want to talk a little bit about Dr. Imai. As
13 Dr. Imai himself testified repeatedly, his analysis tells us
14 nothing about whether or not drawing two majority-black
16:45:51 15 districts complies with the traditional redistricting
16 principles.

17 Dr. Imai said that he did not consider race in drawing his
18 district -- even though as again the Supreme Court has said
19 that you can do so, even though the state itself has said that
16:46:08 20 you should consider race when doing so to comply with the
21 Voting Rights Act, when considering communities of interest,
22 and indeed Dr. Imai said that even he took into consideration
23 as many redistricting principles as he could, but he didn't
24 take into consideration all of them.

16:46:23 25 One important consideration is communities of interest.

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1 And Dr. Imai did not -- wasn't able to identify every community
2 of interest in Alabama, because the state does not provide a
3 list of those things. And those communities may include large
4 places with large black or other racial group populations like
16:46:44 5 the Black Belt.

6 Your Honor, Mr. LaCour also talked about the *Miller* case,
7 which is a Supreme Court case, a series of Supreme Court cases
8 from the 1990s. First of all, *Miller* involved a Section 5
9 objection for the Supreme Court, where the Department of
16:46:59 10 Justice had repeatedly rejected maps drawn by Georgia because
11 they had failed to draw three majority-black districts. The
12 Supreme Court said that that was unnecessary.

13 The reason why the Supreme Court said it was unnecessary
14 to comply with the Voting Rights Act to draw three
16:47:16 15 majority-black districts is because in Georgia, unlike in
16 Alabama, black Congressmen had repeatedly won from majority
17 white congressional districts. In fact, today black
18 Congressmen are elected in Georgia from a majority white
19 congressional districts.

16:47:29 20 That is not and has never been the case in Alabama.
21 Again, no black person in Alabama has ever won a majority white
22 congressional district. That was not the case in the *Miller*.
23 It is not the case today in Georgia. And Alabama has a very
24 different history than Georgia.

16:47:45 25 Finally, on the racial gerrymandering claim, Mr. LaCour

1 ignores the fact that in *Alabama Legislative Black Caucus*, the
2 Supreme Court made very clear and said that states, when
3 they're drawing a district to comply with the Voting Rights
4 Act, must ask to what extent must we preserve existing
16:48:08 5 minorities percentages in order to maintain the minority's
6 present ability to elect the candidate of choice.

7 The Supreme Court has required Alabama and other states,
8 when they're drawing majority-black districts, to consider at
9 what percentage they need to draw those districts. The problem
16:48:21 10 in ALBC was that Alabama chose to draw 60 percent black
11 districts, and didn't consider whether or not a black district
12 would comply with the Voting Rights Act and perform at a level
13 of 50 percent or something else.

14 That's the same issue here. Alabama has drawn a
16:48:37 15 majority-black district that's 60 percent black registered
16 voter population. Plaintiffs shown that districts with as low
17 as 51 or 52 percent black registered voter populations could
18 perform in the same way as District 7 today.

19 Alabama, though, never bothered to consider that question.
16:48:57 20 We have testimony from the Legislature, we have stipulations
21 that Alabama didn't conduct any sort of racial polarization
22 analysis or any other analysis to determine whether or not
23 continuing to pack District 7 was necessary to comply with
24 Voting Rights Act.

16:49:10 25 Your Honor, unless you have any other questions, I

1 appreciate your time.

2 JUDGE MARCUS: Thank you, Mr. Ross.

3 Finally, Ms. Khanna.

4 MS. KHANNA: Thank you, Your Honor.

16:49:26 5 As I mentioned in my previous argument, Caster plaintiffs
6 have established each of the Section 2 elements step by step,
7 methodically proving a Section 2 violation.

8 To say that there's a strong basis in evidence to believe
9 Section 2 requires a second majority-black district would be a
16:49:45 10 glaring understatement in light of the overwhelming evidence in
11 this case.

12 So instead of addressing the Section 2 standard,
13 defendants pivot straight to a hypothetical claim under the
14 Equal Protection Clause, arguing that plaintiffs' illustrative
16:50:01 15 plans are racial gerrymanders.

16 But the Eleventh Circuit has made clear in *Davis* that the
17 question posed under *Gingles I* in a Section 2 case, whether an
18 illustrative plan was created consistent with traditional
19 districting principles is wholly distinct from the question
16:50:18 20 posed in racial gerrymandering cases of whether or not race
21 predominated in drawing district lines. You simply cannot
22 conflate the two. A court adjudicating a state Section 2
23 liability considers only the first question, not the second.

24 Mr. LaCour talked a lot about *Miller v. Johnson*. *Miller*
16:50:37 25 was a racial gerrymandering case, which is very telling. Since

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1 the Eleventh Circuit in *Davis* made clear -- and I will direct
2 quote -- The District Court's attempt to apply authorities such
3 as *Miller* to this Section 2 case is unpersuasive because the
4 *Miller* and *Gingles* lines address very different context, end
16:50:58 5 quote.

6 Defendants' decision to lean into *Miller* only underscores
7 their attempt to turn away from the actual Section 2 legal
8 standard, which we have readily satisfied.

9 But even if defendants could ignore this find binding
16:51:14 10 precedent, they point to no evidence that race predominated in
11 Mr. Cooper's illustrative plans, all of which balance a host of
12 traditional redistricting criteria in myriad ways in accordance
13 with the law and Alabama's own redistricting guidelines.

14 Mr. Cooper testified during the hearing and in his reports
16:51:32 15 that he drew districts to follow county boundaries. And where
16 he had to divide counties to achieve population equality, he
17 followed municipal boundaries. That's with the city of Mobile.
18 Or VTD boundaries, or other objective geographic borders.

19 Mr. Bryan could not point to a single line in Mr. Cooper's
16:51:53 20 illustrative maps that was explainable based on race alone. He
21 conducted no analysis of the extent to which traditional
22 boundaries -- counties, municipalities, VTDs, highways,
23 rivers -- informed those district lines.

24 Mr. LaCour stated several times that plaintiffs' plans
16:52:12 25 scrapped traditional districting principles. But there is zero

1 basis in evidence for that claim. Mr. Cooper considered and
2 balanced every single principle, and certainly the defendants
3 have not established otherwise.

4 It is true that core retention had to compromise to give
16:52:27 5 way to plaintiffs' obligation to create a new district that
6 didn't exist before. But even there Mr. Cooper kept Districts
7 4 and 5 as untouched as possible.

8 He didn't cast aside incumbent consideration. He avoided
9 pairing them in one of his plans, and he paired only two in his
16:52:45 10 other plans.

11 Defendants' complaint is not any of the traditional
12 districting principles were broken or scrapped. Instead, it is
13 that not every traditional principle was maximized. And that
14 is just not the standard.

16:53:01 15 Under defendants' theory, the fact that Mr. Cooper was
16 able to draw a plan with fewer political subdivision splits
17 than the enacted plan will be proof enough that the enacted
18 plan is an unconstitutional racial gerrymander.

19 But clearly, they have taken the opposite position. That
16:53:19 20 is not the law.

21 All defendants have for their claim that racial
22 gerrymandering is what -- is what the plaintiffs' maps provide
23 is that plaintiffs charged with the task of drawing an
24 additional majority-black district in order to advance their
16:53:36 25 claim and be in this court knowingly drew an additional

1 majority-black district.

2 If that not only sounds backwards as an intuitive matter,
3 it is backwards as a legal matter. The Eleventh Circuit has
4 held in *Davis* to penalize plaintiffs for attempting to make the
16:53:56 5 vert showing that *Gingles* demands would make it impossible as a
6 matter of law for any plaintiffs to bring a successful Section
7 2 claim.

8 Contrary to defendants' suggestion, the consideration of
9 race does not equate to the predominance of race. And even if
16:54:12 10 the Eleventh Circuit hadn't made this clear, hadn't already
11 addressed this issue, the fact is that race may predominate in
12 redistricting consistent with the Constitution in order to
13 comply the compelling state interests, which is Section 2 of
14 the Voting Rights Act.

16:54:27 15 The state of Alabama is well aware of this fact. Indeed
16 the Legislature incorporated it verbatim in their redistricting
17 guidelines. To hold otherwise would mean that states could
18 point to the fact that any one principle could have been
19 better, could have been more compact, could have been more
16:54:46 20 maximized to escape liability under Section 2 of the Voting
21 Rights Act, but that is clearly not the law.

22 Mr. LaCour also brought up the Alabama NAACP judicial
23 redistricting case. And I think it's important to call out
24 some very important distinctions between that case and this
16:55:06 25 one.

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1 Again, back to *Davis*, that was a redistricting case for
2 judges who tried to move from an at-large judicial system to
3 entirely new restructured election system, not move district
4 lines this way or that, but to totally revamp the way that
16:55:22 5 judges are elected. And with what the Eleventh Circuit said in
6 *Davis*, and I quote, thus, in this circuit, Section 2 of the
7 Voting Rights Act frankly cannot be said to apply in any
8 meaningful way to at-large judicial elections.

9 So right from the outset, we're just dealing with a
16:55:41 10 different, substantively different kind of issue under Section
11 2 as recognized by the Eleventh Circuit.

12 In that case, in the Alabama NAACP case, there was a
13 dramatically different evidence. The Court criticized the
14 plaintiffs for emphasizing population equality in judicial
16:56:01 15 districts. But that's required in congressional districts.

16 The Court criticized the plaintiffs' racially-polarized voting
17 expert for only looking at races with black candidates. But of
18 course, Dr. Palmer looked at all races.

19 In concluding that partisanship -- that partisanship drew
16:56:18 20 or drove some of the voter choices, the Court there relied
21 heavily on evidence that has not been offered in this case. It
22 pointed to defendants' evidence involving multi-varied analysis
23 controlling for partisan variables, data regarding
24 straight-ticket voting and the impact on judicial elections,
16:56:35 25 and specifically the successes of black-preferred candidates in

1 judicial races.

2 Here, defendant offered no such evidence. And defendants' 3 own expert agrees that race and party are inextricably 4 intertwined.

16:56:51 5 And finally, Your Honor, for that case, it's important to
6 know that case committed a significant legal error in its
7 totality of the circumstances analysis. Even if we put aside
8 all the way that it's factually distinguishable, although it
9 begins with the correct statement that it is not the law that
16:57:07 10 Section 2 plaintiffs must prove racial bias is driving election
11 results, in evaluating the case, it doesn't completely misapply
12 that legal standard, suggesting that plaintiffs need to present
13 evidence of individual voters, quote, subjective voting
14 motivations. The Section 2 effects test was meant to rely on
16:57:27 15 objective evidence and results and ultimate results without
16 creating the evidentiary burden, and, frankly, the divisive
17 atmosphere of having to prove discriminatory intent.

18 This Court is well aware, that district court opinion is
19 not binding here, but the Eleventh Circuit legal standard is.
16:57:48 20 And we would invite the Court not to make the same errors that
21 that Court made.

22 The last point, Your Honor, on timing. Mr. LaCour talked
23 a lot about how a lot of people -- a lot of things might need
24 to get done to allow for a change in the electoral process --
16:58:04 25 in the redistricting maps at this point. But the fact remains

1 there is absolutely nothing unusual about this redistricting
2 case. These cases almost always proceed on expedited schedules
3 once plans are passed and before elections are held.

4 And, yes, the state might have to veer from its planned
16:58:23 5 administrative calendar. But that is not enough to outweigh
6 the fundamental and irreparable harm to plaintiffs' voting
7 rights. When the Legislature -- from when the Legislature took
8 up redistricting last fall to when it passed the enacted maps,
9 it took nine days. Nine days to pass the map that we have been
16:58:45 10 litigating.

11 The Legislature now has some 11 examples of how to draw a
12 map that complies with Section 2. How to draw a map that
13 provides black voters an opportunity to elect in two
14 congressional districts. It can choose any, it can choose
16:59:00 15 none. It can base some portions of its remedy on any one of
16 those.

17 But at the end of the day, even if it were too late, even
18 if January before a May primary, two-and-a-half months before a
19 single ballot needs to be printed were too late, defendants
16:59:18 20 cannot deny that if we have established liability, plaintiffs
21 are entitled to relief at some point. It can't always be too
22 late or too soon. The Court cannot just shrug at the legal
23 violation sit on its hands so as not to inconvenience election
24 officials people or candidates' campaigns.

16:59:37 25 When will it ultimately be the right time to vindicate

1 this Voting Rights Act violation? It wasn't before the last
2 election. That's what they told us then. It's not before
3 the next election. That's what they're telling us now. But
4 eventually, Your Honor, relief must be granted, and we would
16:59:52 5 submit that it must be granted as soon as possible to avoid the
6 vote dilution that is certain to result from the use of the
7 enacted map in any future elections.

8 Thank you, Your Honors.

9 JUDGE MARCUS: Thank you very much. A couple of
17:00:09 10 observations from me, and then I will turn to my colleagues to
11 see if they have anything to add or address.

12 First, I wanted to take a moment to commend all of the
13 lawyers in this case for having done a really outstanding job
14 in preparing and marshalling an enormous body of evidence for
17:00:36 15 this Court to consider in this preliminary injunction hearing.

16 You have presented a very thorough and detailed set of facts,
17 broad and deep that will allow this Court hopefully to reach an
18 appropriate answer. The record is lengthy and detailed.

19 The second, I hope and expect that we will give you an
17:01:09 20 opinion in this case within two weeks of the date when we get
21 the proposed findings of fact and conclusions of law from the
22 parties, which have been set for the end of the day on January
23 the 14th. But I did really want to take a moment to commend
24 all of the lawyers for having done a really outstanding job in
17:01:42 25 this case.

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1 With that, Judge Manasco, any questions or comments?

2 JUDGE MANASCO: Thank you. First, I will echo what
3 you said about the commendation of the lawyers. I think, you
4 know, what all of you were able to accomplish would have been
17:01:57 5 remarkable under any circumstance in this amount of time. But
6 I am mindful that there were holidays, and there was pandemic
7 duress, and so I think it was all the more remarkable under the
8 circumstances.

9 The other thing is I still do have one question. And I
17:02:13 10 will direct it to Mr. Davis, if he's still with us.

11 But, Mr. Davis, you are free to punt it to any other
12 person on your team, if you think appropriate. And it's really
13 just sort of an evidentiary question about the logistics. We
14 have heard a lot today about timing. And I recall you saying
17:02:35 15 at one of our earlier proceedings early on in the life of the
16 case that if any relief were ordered, the Legislature would
17 want the opportunity to take the first cut at another map. And
18 so my question is: Is there anything in the record or any
19 argument you want to make about how long that might take if --
17:02:59 20 and I underscore the if -- any relief were ordered?

21 MR. DAVIS: Your Honor, there is nothing in the record
22 to my knowledge that would address that question. I can share
23 that you would -- we got the census data -- the day we got the
24 census data is in the record, and the draft congressional plan
17:03:18 25 was completed soon before the reapportionment committee met.

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1 That's not quite apples to apples because the map drawer was
2 also working on other maps.

3 All I can tell you -- I think it would take at least a
4 couple of weeks to confer to meet with legislators. The
17:03:36 5 Legislature will be in session, so we won't have to go through
6 the Governor to call. But you have to draft the plan, then it
7 will take several days to get to the Legislature.

8 Mr. Walker, do you have more information that you can
9 share? I will give you this seat.

17:03:49 10 MR. WALKER: No. Just saying there will be -- it will
11 be more difficult because --

12 MR. DAVIS: Oh. I think -- it may -- I take it
13 Mr. Walker's point is however long it took last time had he
14 been doing just the congressional plan, might take longer since
17:04:07 15 inevitably an order would require drastic changes. It would
16 not be a least change. So there would be more the Legislature
17 has to weigh because it would blow up the map. It would be
18 completely different from the way things were before.

19 So I couldn't give you anything more than a guess. I
17:04:26 20 don't see how it could possibly be done within less than a
21 couple of weeks. But it could be much longer. It could be a
22 little quicker. That's the best I could do, Judge.

23 JUDGE MANASCO: Understood. Thank you.

24 JUDGE MARCUS: Any other comments or questions about
17:04:45 25 that from anyone, or, Judge Moorer, any questions?

1 MR. LACOUR: I am I guess depending on the ruling the
2 legislative redistricting committee could even potentially pass
3 new guidelines and do new things. One of the guidelines in
4 North Carolina at issue in the *Rucho* case was partisan
17:05:06 5 advantage, for example. And they used that to draw the present
6 gerrymander. That's not what we did in this case despite
7 having a supermajority of Republicans in both houses.

8 But in any event, there are multiple considerations that
9 through no fault of the Legislature at that point if we are
17:05:27 10 enjoined from using our current map.

11 JUDGE MANASCO: Understood.

12 MS. KHANNA: Your Honor, if I may.

13 JUDGE MARCUS: Ms. Khanna?

14 MS. KHANNA: If I may just touch briefly on this. At
17:05:40 15 the time of the Legislature drew the enacted plan, it also drew
16 a State House plan, a State Senate plan, a State Board of
17 Education plan. It was drawing a lot of plans at the same
18 time. I can imagine it would take less time to focus just on
19 the one plan and the violation that this Court would specify if
17:05:56 20 it were to find in favor of plaintiffs.

21 Mr. LaCour also brought up North Carolina. North Carolina
22 I believe has a statute that says if the Court -- when and if a
23 Court strikes down an enacted redistricting map, the
24 Legislature gets two weeks to provide a remedy. North Carolina
17:06:12 25 legislatures have done this multiple times and I think well

1 under two weeks several times. So this is -- like I said, the
2 expedited process here not new. The need to redraw maps is not
3 new. The need to make clear that any new map regardless of
4 what the state's preferred guidelines are needs to comply with
17:06:29 5 Section 2 of the Voting Rights Act is certainly not new and is
6 required by law.

7 JUDGE MANASCO: Thank you.

8 JUDGE MARCUS: Any other questions or comments? Judge
9 Moorer?

17:06:42 10 JUDGE MOORER: No. I just want to echo the comments
11 of my colleagues about the lawyers' performance in this case.
12 Your help has been very, very good and very helpful to the
13 Court.

14 JUDGE MARCUS: Anything further from any of the
17:06:57 15 parties? If not, we will be adjourned. Mr. Blacksher for the
16 Singleton plaintiffs?

17 MR. BLACKSHER: No, Your Honor. Thank you very much.

18 JUDGE MARCUS: Mr. Ross for Milligan?

19 MR. ROSS: No, Your Honor. Just thanking the panel
17:07:13 20 for their time and attention to these issues.

21 JUDGE MARCUS: Ms. Khanna?

22 MS. KHANNA: No, Your Honor. Same thing. I just want
23 to thank the Court for its flexibility, time, and patience.

24 JUDGE MARCUS: Mr. Davis, anything further or
17:07:24 25 Mr. LaCour?

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1 MR. DAVIS: Nothing else from the defendants, Judge.

2 JUDGE MARCUS: Thank you all much. I am sorry.

3 Mr. LaCour, was there anything further?

4 MR. LACOUR: Just thanking you all as well.

17:07:35 5 JUDGE MARCUS: Thank you all again for your
6 considerable efforts. This Court is adjourned.

7 (Whereupon, the above proceedings were concluded at

8 5:07 p.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Christina K. Lecker

01-12-2022

12 || Christina K. Decker, RMR, CRR

Date

13 || Federal Official Court Reporter

14 || ACCR# : 255